



The Right to Justice for Victims of Human Rights Crimes

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the degree of Doctor of Laws of the European University Institute

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This thesis was submitted for language correction

Abstract

The past three decades have seen increasing concern in the international community for the need to more effectively ‘do justice’ for victims of mass atrocities. At the same time, there is a growing recognition that such justice includes, together with the need to ensure that appropriate reparation is provided to victims, the criminal accountability of those responsible for the most serious crimes. This thesis argues that there is an intrinsic relationship between these two emerging values. In particular, it demonstrates that a right to justice, understood as the right to the determination of the individual criminal responsibility of wrongdoers, is emerging under international law as an imperative remedy for victims of gross human rights violations and international crimes, alongside more traditional forms of reparation.

The development of victims’ right to justice invites a reconsideration of the role and the rights of victims in criminal proceedings. It is argued that if victims have a right to the prosecution of human rights offenders as an integral component of their right to remedy, it is legitimate to assert that they should also be granted corresponding procedural rights in the criminal process. Through an extensive review of international legal instruments and practice and a comparative analysis of domestic criminal justice systems, this study demonstrates that the role of victims and the rights they possess in criminal proceedings have considerably expanded during the past three decades. The most significant development can be found in the law and practice of international and internationalized criminal tribunals, where procedures have been introduced aimed at enabling victims to participate in the proceedings. The incorporation of a regime of victim redress within the framework of international criminal tribunals not only represents an extension of the mandate of international criminal justice but also confirms a shift in the way in which redress is conceptualised at the international level.

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List of Main Abbreviations

AC	Appeals Chamber
ACHR	American Convention on Human Rights
AfrCHPR	African Charter on Human and Peoples' Rights
AfrComHPR	African Commission on Human and Peoples' Rights
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECCC IR	Internal Rules of the Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
EcomHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
EECC	Eritrea-Ethiopia Claims Commission
HRC	Human Rights Committee
IACtHR	Inter-American Court of Human Rights
IAComHR	Inter-American Commission of Human Rights
ICC	International Criminal Court
ICCSt.	Statute of the International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICL	International Criminal Law
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda

ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILA	International Law Association
ILC	International Law Commission
IMT	International Military Tribunal at Nuremberg
IMTFE	International Military Tribunal for the Far East
PCIJ	Permanent Court of International Justice
PTC	Pre-Trial Chamber
SCSL	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon
STLSt.	Statute of the Special Tribunal for Lebanon
RPE	Rules of Procedure and Evidence
TC	Trial Chamber
UNCC	United Nations Compensation Commission
UN GA	United Nations General Assembly
UN SC	United Nations Security Council

Introduction

1 THE GROWING RELEVANCE OF REDRESS FOR VICTIMS IN INTERNATIONAL LAW

Thirty years ago, the American criminologist William F. McDonald referred to victims of crime as the forgotten men.¹ This definition could equally describe the position of victims under international law since, until very recently, little effort had been made to address the needs of victims. The neglect of victims of mass atrocities has its roots primarily in the fact that states have historically had a monopoly as the only subjects of rights under international law.² Describing the traditional position of individuals harmed by violations of international law, Dionisio Anzilotti wrote that '[l]a conduite d'un Etat, toute contraire qu'elle soit au droit international ne saurait jamais donner naissance à un droit de l'individu à la réparation du dommage souffert'.³ Accordingly, since the commission of wrongful acts and the granting of reparation were considered purely a matter of inter-state relations and inter-state responsibility,⁴ individual victims were left entirely at the mercy of the discretionary intermediation of their nation state to take up their claim for reparation on their behalf.

Over the course of the past three decades, however, the focus of the international community has increasingly shifted to victims' needs and concerns, leading to a considerable expansion of the scope of redress available to individuals who have suffered harm as a consequence of an international wrongful act.⁵ The latest and most widely discussed development in this respect is the creation of redress regimes within recently established international and internationalized criminal tribunals, namely the International Criminal Court ('ICC'), the Extraordinary Chambers in the Courts of Cambodia ('ECCC') and the Special Tribunal for Lebanon ('STL'). Although utilising different modalities, these courts entitle victims to participate in proceedings in their own right in cases against the alleged

¹ W.F. McDonald, 'Toward a Bicentennial Revolution in Criminal Justice: The Return of the Victim', 13 *American Criminal Law Review* (1976) 649-673, at 650.

² A. Randelzhofer, 'The Legal Position of the Individual under Present International Law', in A. Randelzhofer and C. Tomuschat (eds), *State Responsibility and the Individual: Reparations in Instances of Grave Violations of Human Rights* (The Hague: Martinus Nijhoff Publishers, 1999) 231-242.

³ D. Anzilotti, 'La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers', 13 *Revue générale de droit international public* (1906) 5-29; see contra H. Lauterpacht, *International Law and Human Rights* (London: Steven and Sons, 1950) 27-47.

⁴ For a thorough review of the law and practice of reparations in the law of state responsibility, see D. Shelton, *Remedies in International Human Rights Law*, 2nd ed. (Oxford: Oxford University Press, 2005), 50-103.

⁵ See *infra* Section 2.1.

perpetrators of the crimes from which they have suffered.⁶ The ICC and the ECCC may also award reparation to the victims of international crimes.⁷

The recognition of victims' rights before international criminal tribunals is not an isolated phenomenon, although the considerable literature on this subject has tended to analyse it in a compartmentalised manner.⁸ It is, in fact, in keeping with a number of significant developments that have occurred throughout the last few decades, mainly under the regime of international human rights law, with respect to redress for victims of serious violations of human rights. In particular, while affirming the existence of an individual right to remedy, a substantial number of international legal instruments and practice have challenged the traditional categories of restitution and monetary compensation as appropriate remedies in cases of gross human rights breaches. Instead, these legal instruments and relevant practice have taken the position that 'the accountability of individual perpetrators of grave human rights violations is one of the central elements of any effective remedy for victims of human rights violations.'⁹

Today a growing body of literature on impunity for gross violations of human rights, both from a psychological and a legal perspective, supports the view that the prosecution of perpetrators would in some way alleviate the suffering of victims. Whilst courts cannot provide individual rehabilitation as such, they may aid the rehabilitation of society¹⁰ and, in addition, certain aspects of the criminal process and outcome may provide victims with closure.¹¹ A number of legal scholars have also contended that justice can alleviate a victim's desire for revenge and foster respect for democratic institutions. For instance, Antonio Cassese, the then President of the ICTY, observed:

⁶ See Art. 68(3) ICC Statute ('ICCSt. '); Art. 17 STL Statute ('STLSt. '); Rule 23 ECCC Internal Rules (Rev.8), as revised on 3 August 2011 ('ECCC IR').

⁷ Art. 75 ICCSt.; Rule 23 *quinquies* ECCC IR.

⁸ These works mainly focus on how these regimes will operate in practice, considering the practical and legal obstacles they will face and exploring emergent practice. Recent publications on the topic include: B. McGonigle Leyh, *Procedural justice? Victim Participation in International Criminal Proceedings* (Cambridge: Intersentia, 2011); J.C. Ochoa S., *The Rights of Victims in Criminal Justice Proceedings for Serious Human Rights Violations* (Leiden: Martinus Nijhoff Publishers, 2013); H. Olásolo, 'Victims' Participation According to the Jurisprudence of the International Criminal Court', in *Idem, Essays on International Criminal Justice* (Oxford: Hart, 2012); C. Van Den Wyngaert, 'Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge', 44 *Case Western Reserve University School of Law* (2012) 475-496.

⁹ UN General Assembly ('UN GA'), Khmer Rouge Trials, UN Doc. A/Res/57/228, 27 February 2003, at 1.

¹⁰ See e.g. M. Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick, N.J.: Transaction Publishers, 1997), at 69.

¹¹ J. O'Connell, 'Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?', 46 *Harvard International Law Journal* (2005) 295-345.

[J]ustice dissipates the call for revenge, because when the Court metes out the perpetrator his just deserts, then the victims' calls for retribution are met; by dint of dispensation of justice, victims are prepared to be reconciled with their erstwhile tormentors, because they know that the latter have now paid for their crimes.¹²

It can be argued that the growing awareness of victims' rights, and with it the idea that victims have a legitimate interest in the prosecution of human rights offenders, has influenced the development of human rights instruments and their interpretation. In particular, an overview of human rights treaties and their interpretation by the competent courts and institutions at the international and regional level indicates that criminal measures are increasingly considered as essential in the context of human rights protection.¹³ However, theories about the role of victims in this context are still emerging. More precisely, it is still unclear to what extent a right to justice,¹⁴ understood as the right to have alleged human rights offenders prosecuted, is embraced as an integral element of remedy for serious human rights violations.

On the whole, recent years have seen increasing concern in the international community regarding the need to more effectively 'do justice' for victims and a growing recognition that this includes, along with the need to ensure that appropriate reparation is provided to them, the rapid development of a global norm in support of criminal accountability for the most serious crimes. The question that arises out of such increasing concern is whether there is any link between these two emerging trends. In other words, is there any relationship between redress for victims and the prosecution of those responsible for serious violations of human rights? And does this relationship have any impact on the role that victims should play in criminal proceedings? With these questions in mind, this thesis seeks to understand whether a distinct redress regime exists with regard to gross violations of human rights and, if so, what the main features of this regime are.

This subject remains virtually unexplored in the literature to date. Indeed, the wealth of scholarly contributions that have been published on the development of victims' right to reparation under international law rarely refer to the practice of international criminal

¹² A. Cassese, 'Reflections on International Criminal Justice', 61 *Modern Law Review* (1998) 1-10, at 6.

¹³ See A. Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (Oxford: Oxford University Press, 2009), at 206-227, and the case law cited therein.

¹⁴ The 'right to justice' is explicitly provided for only in two UN declarative instruments. See Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)*, Revised Final Report Prepared by Mr. Joinet Pursuant to Sub-Commission Decision 1996/119, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997, § 27; Commission on Human Rights, *Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, Diane Orentlicher; *Addendum: Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, Principles 19-30.

tribunals which have incorporated victims' redress regimes.¹⁵ Furthermore, publications on the issue of victims' rights in international criminal proceedings fail to grasp the intrinsic relationship between these rights and the development of the right of access to justice and to remedy for the victims of gross violations of human rights.¹⁶ Finally, studies on accountability for human rights atrocities and international crimes have only tangentially dealt with the position of victims, most often rejecting the claim that victims' rights and legitimate interests should be incorporated into criminal trials.¹⁷

This thesis aims, therefore, to fill this scientific gap — which is no longer justified in light of the groundbreaking developments of the last few decades — by analysing the emerging right to criminal justice for victims of gross violations of human rights and international crimes, linking the concept of victims' redress and the fight against impunity.

¹⁵ Publications on this topic mainly focus on the practice of human rights supervisory bodies. See e.g., D. Shelton, *supra* note no. 4; F. Francioni (ed.), *Access to Justice as a Human Right* (Oxford, New York: Oxford University Press, 2007).

¹⁶ See *supra* note no. 8.

¹⁷ A. Seibert-Fohr, *Prosecuting Serious Human Rights Violations*, *supra* note no. 13.

2 MAIN THEMES OF THE DISSERTATION

Four main themes will be treated in this dissertation. As will be argued throughout the thesis, these themes have substantially evolved in recent years in an interconnected manner.

2.1 Victims' Right to Remedy

The obligation to provide reparation as a consequence of an international wrongful act is a well-established principle under international law. As early as 1928, the Permanent Court of International Justice (PCIJ) held that it is a fundamental principle of general international law that the breach of an international obligation 'involves an obligation to make reparation in an adequate form.'¹⁸ However, as observed above, a state-centric approach has been traditionally adopted with regard to the access of individuals to reparation measures.

This state-centric approach was dramatically transformed in the period after World War II, which brought an increasing concern with the role and the rights of individuals under international law. On the one hand, the individual criminal responsibility of perpetrators was established at the international level¹⁹ and on the other, international law governing the rights of victims developed rapidly. Indeed, the individual has increasingly become a direct holder of certain rights and can no longer be considered as a mere beneficiary under international law.

This trend is most evident in the field of international human rights law where a variety of legal instruments at the international and regional level,²⁰ as well as a number of soft law texts including declarations²¹ and general comments of treaty bodies,²² either impose

¹⁸ PCIJ, *Case Concerning the Factory at Chorzów* (Germany v. Poland), Jurisdiction, Series A No. 9, 26 July 1927, at 21.

¹⁹ An oft-cited quotation by the Nuremberg Tribunal asserts: '[C]rimes against international law are committed by men, not by abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced'. *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946* (Nuremberg: International Military Tribunal, 1947), at 223.

²⁰ At the universal level, for instance: Art. 2(3) of the International Covenant of Civil and Political Rights ('ICCPR'); Art. 11 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Art. 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT'); Art. 6 of the International Convention on the Elimination of All Forms of Racial Discrimination ('CERD'). At the regional level: Art. 13 of the European Convention on Human Rights ('ECHR'); Art. 47 of the Charter of Fundamental Rights of the European Union; Art. 25 of the American Convention on Human Rights ('ACHR'); Art. 7 of the African Charter on Human and Peoples' Rights (although it does not mention the right to remedy, but rather refers to 'the right to have his cause heard') ('AfrCHPR').

²¹ E.g., Art. 8 of the Universal Declaration of Human Rights; Art. XVIII of the American Declaration of the Rights and Duties of Man; Art. 3 Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation.

a duty on states to provide individuals with an effective remedy,²³ or establish an individual right to an effective remedy.²⁴ A number of instruments also provide individuals with an enforceable right to seek and obtain redress under the treaty-based framework of human rights protection and promotion.²⁵

A review of the judicial and quasi-judicial practice of human rights supervisory bodies with the power to award (or, at the very least, to recommend) reparation to individuals whose rights have been violated indicates that restitution and monetary compensation have long been the most common remedies granted to victims.²⁶ Nevertheless, more recently these bodies have increasingly acknowledged that restitution or compensation alone is an inadequate form of redress considering the gravity of the harm suffered and, most importantly, that in the majority of cases the injury sustained as a consequence of these violations cannot be repaired by way of restitution or compensation.

As such, the assumption that the most obvious need for victims is for compensation has been increasingly challenged and a ‘return to a symbolic dimension’²⁷ has been recommended instead (particularly in view of the fact that most victims of serious human rights breaches rate their need to know what happened to them, or to their beloved ones, and why more highly than compensation). Accordingly, human rights courts have directed states to take specific action besides restitution or compensation to remedy human rights violations. In particular, a review of the case law of human rights supervisory bodies highlights that for victims of violations of the right to life and personal integrity, such as in cases involving arbitrary detentions, forced disappearances, torture and extrajudicial executions, prosecution of the offenders is necessary to make the remedy effective.²⁸ In other words, a right to

²² E.g., Human Rights Committee (‘HRC’), *General Comment No. 31, The Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004.

²³ Art. 2(3) ICCPR.

²⁴ Art. 13 ECHR; Art. 25 ACHR.

²⁵ Art. 5(4) First Optional Protocol ICCPR; Art. 41 ECHR; Art. 63 ACHR; Art. 27(1) AfrCHPR.

²⁶ For instance, in the influential *Velázquez Rodríguez* case, the Inter-American Court of Human Rights (‘IACtHR’) awarded compensatory damages to the family of Manfredo Velázquez Rodríguez, but did not order the prosecution and punishment of those responsible which was requested by the family as moral reparation (*Velázquez Rodríguez v. Honduras*, Judgment (Reparations and Costs), 21 July 1989, §§ 9 and 60); likewise, a review of the European Court of Human Rights’ (‘ECtHR’) case law reveals that the Court’s remedial power under Article 41 ECHR was initially regarded as limited to monetary compensation and declarative relief only, and the Court has repeatedly ruled that it lacks authority to issue explicit directions on remedial matters (e.g., *Mehemi v. France* (App. No. 25017/94), Judgment (Merits and Just Satisfaction), 26 September 1967, §§ 41 and 43).

²⁷ M. Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998).

²⁸ I expand on this ideas in V. Spiga, ‘No Redress without Justice: Victims and International Criminal Law’, 10 *Journal of International Criminal Justice* (2012) 1377-1394, at 1381-1384.

criminal justice is being affirmed as an integral component of the right to remedy for victims of gross violations of human rights.

2.2 Confronting Gross Human Rights Violations with Prosecutions: A Duty and a Right?

Gross human rights violations have occurred throughout the last century in all parts of the world in times of peace and in times of war. Clearly, confronting gross human rights violations is a much more difficult endeavour than confronting ordinary crimes due to the high number of perpetrators and victims as well as the complex task of initially identifying and categorising wrongful conduct and later determining responsibility for it. The instruments employed to deal with gross human rights violations have been various, ranging from the creation of international tribunals (when these violations amount to international crimes) to the initiation of domestic trials, administrative proceedings and general amnesties.

In this regard, however, it has been rightly observed that '[s]ilence and impunity have been the norm rather than the exception'.²⁹ It is submitted that the prevalence of impunity over accountability in the aftermath of gross violations of human rights may be attributed to two main distinct but interrelated factors. The first is that traditionally accountability for human rights violations fell under the 'domaine réservé' of the state concerned. According to the traditional Grotian model of public international law, the sovereignty of states covered the acts against of a state against its own citizens, regardless of the lawfulness of such acts.³⁰ Secondly, in the absence of a specific obligation to prosecute and punish those responsible for gross human rights violations, states have often opted for alternative solutions to criminal trials with a view to stopping the violations (if these are still ongoing) or avoiding the risk of provoking further violence.³¹

Nonetheless, since the end of World War II, in the wake of widespread revulsion against the crimes committed during the conflict, states finally began to accept limits on their sovereignty in relation to the human rights of those individuals subject to their jurisdiction. Since then, the duty of states to prosecute certain serious crimes has gradually become settled law. Over the last three decades, international law and policy have shown growing support for

²⁹ C. Nino, *Radical Evil on Trial* (New Haven: Yale University Press, 1996), at 3.

³⁰ On this issue, see K. Ambos, 'Judicial Accountability of Perpetrators of Perpetrators of Human Rights Violations and the Role of Victims', *International Peacekeeping* (March 2000 – June 2000), 67-77, at 67.

³¹ For a global perspective on the use of criminal prosecution in the aftermath of gross violations, see C. Nino, *supra* note no. 29, at 3-40.

the principle ‘that the most serious crimes of concern to the international community as a whole must not go unpunished’.³² Two elements, in particular, signal the increasing support for a state’s obligation to investigate and prosecute violations of personal integrity and take action against those responsible, namely (i) the adoption of treaties explicitly providing for the obligation of states to prosecute and punish perpetrators of acts defined as crimes under international law;³³ and (ii) the interpretation by human rights supervisory bodies of the obligation to ‘respect and ensure’ rights as entailing the duty to prosecute those responsible for gross violations of human rights.³⁴

The duty to prosecute has therefore been traditionally framed as an objective duty of general human rights protection. The main argument for criminal prosecution is that it is the most effective insurance against future violations: the failure to prosecute and punish human rights violations may result in a lack of protection against further abuses.³⁵ Furthermore, impunity of perpetrators is perceived as a retroactive acceptance of the violations committed.

At the same time, as observed above, the traditional concept of prosecution and punishment as a measure of general human rights protection is gradually becoming broader in scope. Notably, the decisions of treaty-based human rights bodies and the provisions of binding and non-binding international human rights documents have evolved to consider effective prosecutions as an essential component of the remedy that states must guarantee victims of right to life or inhumane treatment violations. States not only have a duty to the public but also to the victims to prosecute grave human rights abuses. The development of this practice seems to justify the emergence of a victim’s right to justice for serious human rights violations, which coexists with the relevant state’s duty to prosecute.

The framing of criminal justice as a victim’s right raises a number of theoretical questions that will be addressed throughout this thesis. In particular, three issues deserve

³² Preamble, ICCSt.

³³ D. Orentlicher, ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’, 100 *Yale Journal of International Law* (1991) 2537-2615. Examples of universal treaties demanding the criminalisation and punishment of certain gross human rights offenses are the Convention on the Prevention and Punishment of the Crime of Genocide (arts. 4 and 5), the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Art. 49), the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Art. 50), the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Art. 146), the Geneva Convention Relative to the Treatment of Prisoners of War (Art. 129), the CAT (Art. 2), the Convention to Suppress the Slave Trade and Slavery (Art. 6), the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (Art. 1), and the International Convention on the Suppression and Punishment of the Crime of Apartheid (Art. 4).

³⁴ See e.g., IACtHR, *Velázquez Rodríguez*, *supra* note no. 26, § 4; ECtHR, *LCB v. United Kingdom* (App. No. 23413/94), Judgment (Merits), 9 June 1998, § 36.

³⁵ M.C. Bassiouni, ‘Accountability for Violations of International Humanitarian Law’, in Idem (ed.), *Post-Conflict Justice* (Ardsley: Transnational Publishers, 2002) 3-54, at 52.

special attention. First, the relationship between the duty to prosecute and victims' right to justice needs to be clarified. For instance, since criminal prosecution is conceived as a component of victims' right to remedy, one may argue that victims could forfeit such right by asking that no action be taken against the offenders. Nonetheless, victims' right to justice coexists with the state's duty to prosecute. This point has been addressed by the Inter-American Court of Human Rights, which stated that the duty to conduct an effective criminal trial is separate from the state's duty to repair the harm suffered by victims.³⁶ Therefore, even if the victim asks to leave the violations unpunished, the state is not exempted from the duty to prosecute such violations, in order to 'respect and ensure' the rights of persons under its jurisdiction.

A second issue which will be taken into consideration is the impact of the affirmation of victims' right to justice on the scope of the duty to prosecute. It could be argued that if the idea of a right to justice were pursued, a fundamental change would occur in relation to the scope of the duty to prosecute and punish. Conceiving the duty to prosecute and punish in the general pursuit of the overall protection of human rights, as was the case traditionally, potentially subjects the duty itself to an inherent limitation, which is especially relevant in post-conflict situations. This limitation is that the duty to punish should not be read as an obstacle to the restoration of peace and social security in the community affected by serious violations of human rights.

Accordingly, while the state remains under the obligation to criminalise serious violations of human rights, as well as to establish effective law-enforcement machinery, deviation from the duty to prosecute and punish should be allowed if this would better serve the general enjoyment of human rights. On the contrary, if the criminal accountability of human rights offenders is also considered as a remedial measure for victims, there is no room to argue that it can be compromised in favour of the general protection of human rights. As such, the possibility of utilising alternative mechanisms of redress (such as truth and reconciliation commissions) and the option to perform a balancing act (accountability *versus* peace) are precluded. It is argued that the emergence of remedy as a rationale for prosecution and punishment potentially offers a better contribution in the fight against impunity.

Finally, conceiving criminal prosecution as an integral component of victims' right to remedy may be at odds with the way in which the concept of reparation has been used in

³⁶ IACtHR, *Villagrán Morales v. Guatemala*, Judgment (Reparations and Costs), 26 May 2001, § 99.

international law, where it is considered to be non-punitive in character.³⁷ Does this emerging trend imply a shift in character in the way we conceive reparation? In order to answer to this question, an extensive analysis has to be conducted of the relationship between reparation and criminal prosecution as construed in the law of state responsibility. Interestingly, judicial bodies have linked the state's failure to prosecute to the so-called 'denial of justice', a concept comparable to the right to remedy as it has emerged in modern human rights. This link is well exemplified in the famous dictum by Max Huber in the *Spanish Moroccan* case, in which he affirmed that the responsibility of a state can be invoked in relation to the denial of justice when it does not carry out due diligence in the pursuit of criminals.³⁸ The existence of a link between the obligation to prosecute and punish human rights offenders and the right to reparation also became apparent in the early conceptualisation of the law of state responsibility.³⁹ However, doubts have been expressed regarding whether the obligation to criminally prosecute wrongdoers is an element of a primary obligation imposed on the State or whether it is a secondary obligation arising from the commission of an international wrongful act.⁴⁰

2.3 Victims and Criminal Justice

Reading criminal justice into victims' rights also necessitates a reconsideration of the role of victims in criminal proceedings and the rights they possess. Indeed, if victims have a right to the prosecution of human rights offenders as an integral component of their right to remedy, it

³⁷ C.J. Tams, 'Do Serious Breaches Give Rise to Any Specific Obligations of the Responsible State?', 13 *European Journal of International Law* ('EJIL') (2002) 1161-1180, at 1166-1170; but see *contra* F.V. García-Amador, *The Changing Law of International Claims*, vol. 2 (Dobbs Ferry: Oceana Publications, 1984), at 575.

³⁸ *Affaires des biens britanniques au Maroc Espagnol* (Espagne c. Royaume-Uni), 1 March 1925, *Recueil de sentences arbitrales*, vol. II, 615-742, at 645 ('[L]a responsabilité de l'état peut être engagée dans les situations en question, non seulement par un manque de vigilance dans la prévention des actes dommageables, mais aussi par un manque de diligence dans la poursuite pénale des fauteurs, ainsi que dans l'application des sanctions civiles voulues.').

³⁹ For instance, the punishment of individual perpetrators was recognised as an element of satisfaction in the work of the Preparatory Committee of the League of Nations Codification Conference in 1930. The Basis of Discussion Draft 29 established that '[r]esponsibility involves for the State concerned an obligation to make good the damage suffered ... It may also, according to the circumstances, and when this consequence follows from the general principles of international law, involve the obligation to afford satisfaction to the State which has been injured ... in the shape of an apology (given with the appropriate solemnity) and (in proper cases) *the punishment of the guilty persons*' (emphasis added). See also International Law Commission ('ILC'), *Draft Articles on State Responsibility with Commentaries Thereto Adopted by the International Law Commission on First Reading*, Art. 45 (January 1997).

⁴⁰ ILC, *Third Report on State Responsibility by Mr James Crawford*, Special Rapporteur, UN Doc. A/CN-4/507/Add.4, 15 March 2000, §§ 40 and 57-59.

would seem legitimate to assert that they should be granted corresponding procedural rights in the criminal process.

In contrast to the development of human rights norms protecting the rights of the defendant, traditionally little attention has been paid to the rights of victims in criminal proceedings. The vast majority of international treaties do not make any explicit reference to the right of victims to standing or to be heard in criminal proceedings. This is probably due to the fact that, in order to secure the support of a significant number of states, these documents have been drafted with a view to not interfering with the margin of appreciation for the domestic practices of states. As a matter of fact, the position of victims in national criminal justice systems varies significantly between states and depends primarily on the criminal model adopted and to the legal tradition to which the state belongs. Whereas victims' rights in criminal proceedings have traditionally been recognised in civil law countries,⁴¹ it is a largely unfamiliar concept to common law countries like the United States where victims may be called to testify as witnesses but generally play no further role in the proceedings. If a victim wishes to claim compensation or seek any other remedy in a common law jurisdiction they are compelled to bring a separate civil action.⁴²

Despite the significant differences between these two models, in recent years it would seem that the gap between them, at least with respect to the recognition victims' rights in criminal proceedings, has been narrowing. This narrowing of the gap can be attributed in part to the influence of emerging international legal standards on the rights of victims of crime.⁴³

In the last two decades, a number of documents have been adopted at the international and regional level acknowledging the importance of considering victims' concerns in the criminal process. Starting with the UN *Basic Principles of Justice for Victims of Crime and Abuse of Power* in 1985,⁴⁴ and a Council of Europe Recommendation of the same period,⁴⁵ international legal norms began to recognise that victims need to be treated with compassion and respect for their dignity and that they are entitled to redress for their suffering in terms of

⁴¹ M. Chiavario, 'Private Parties: The Rights of the Defendant and the Victim', in M. Delmas-Marty and J. R. Spencer (eds), *European Criminal Procedures* (Cambridge: Cambridge University Press, 2002) 541-593, at 542-547.

⁴² See generally D.E. Beloof, P.G. Cassel, and S.J. Twist, *Victims in Criminal Procedure*, 2nd ed. (Durham: Carolina Academic Press, 2006); G.P. Fletcher, *With Justice for Some: Protecting Victims' Rights in Criminal Trials* (Reading: Addison Wesley, 1996); but see also W.T. Pizzi, 'Victims' Rights: Rethinking Our Adversarial System', *Utah Law Review* (1999) 349-368.

⁴³ See in this respect R. Aldana-Pindell, 'In Vindication of Justiciable Victims' Right to Truth and Justice for State-sponsored Crimes', 35 *Vanderbilt Journal of International Law* (2002) 1399-1502.

⁴⁴ UN GA, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN Doc. A/RES/40/34, 29 November 1985.

⁴⁵ Council of Europe, Committee of Ministers, *Recommendation No. R (87) 21 of the Committee of Ministers to Member States on Assistance to Victims and the Prevention of Victimization*, 17 September 1987.

access to justice and reparation. Furthermore, a number of international instruments,⁴⁶ as well as the practice of human rights supervisory bodies,⁴⁷ have consistently supported the view that victims should be granted some participatory rights in criminal proceedings in order to promote and protect their right to justice. Nonetheless, these documents and decisions have not established that the right to justice demands the recognition of victims as parties of the proceedings having full participatory rights. Rather, they have acknowledged that victims' participation may vary considerably according to the criminal model adopted.

It is argued that affirming that a victim has a right to justice is not only a question of providing him or her with the faculty to report a crime, as this faculty normally belongs to every individual. Nor is it sufficient to recognise that a victim's complaint is a prerequisite for opening criminal proceedings, if the initiative and the conduct of such proceedings depend on other actors (such as the public prosecutor). In order to ensure that victims effectively exercise their right to justice, it is necessary that the victim play some role in criminal cases analogous to that of a person entitled to bring a civil case, being able to initiate a criminal action either as complementary to, or instead of the public prosecutor.

It goes without saying that if the decision is taken not to initiate proceedings or to terminate the prosecution of an alleged offender, victims potentially lose their chance of obtaining justice. As such, although human rights bodies remain reluctant to elaborate a victim's right to participate in criminal proceedings corresponding to the increasingly developed right to justice, some recent instruments adopted at the international and regional have established that victims should be have certain procedural rights in order to protect such a right. In particular, some of these instruments have set out the right of victims to challenge

⁴⁶ Documents setting forth victims' rights in criminal proceedings include: *Declaration of Basic Principles of Justice*, *supra* note no. 44 (Art. 6(b)); *Convention against Transnational Organized Crime*, GA Res. 55/25, 15 November 2000 (Art. 25(3)); European Union ('EU'), *Council Framework Decision on the Standing of Victims in Criminal Proceedings*, 2001/220/JHA, 15 March 2001 (Art. 3); EU, *Directive 2012/29/EU of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime*, 25 October 2012 (Art. 20); African Commission on Human and Peoples' Rights ('AfrComHPR'), *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 2001 (Principle P(f)(ii)).

⁴⁷ See e.g., ECtHR: *Kaya v. Turkey* (App. No. 22729/93), Judgment (Merits and Just Satisfaction), 19 February 1998, § 107; *McKerr v. United Kingdom* (App. No. 28883/95), Judgment (Merits and Just Satisfaction), 4 May 2001, §§ 111-115; *Paul and Audrey Edwards v. United Kingdom* (App. No. 46477/99), Judgment (Merits and Just Satisfaction), 14 March 2002, §§ 69-73; *Bitiyeva and x. v. Russia* (App. Nos 57953/00 and 37392/03), Judgment (Merits and Just Satisfaction), 21 June 2007, § 156, with references included therein. IACtHR: *Durand and Ugarte v. Peru*, Judgment (Merits), 16 August 2000, § 129; *El Caracazo v. Venezuela*, Judgment (Reparations and Costs), 29 August 2002, § 118; *Rochela Massacre v. Colombia*, Judgment (Merits, Reparations and Costs), 11 May 2007, § 195.

the decision of public prosecutors not to prosecute, either by way of judicial review or by authorising parties to engage in private prosecutions.⁴⁸

With a view to assessing whether common standards are emerging in this respect, this work will provide an overview of how victims' rights have been implemented in domestic criminal systems, with a particular emphasis placed on the right to bring a private prosecution and the right to challenge decisions not to prosecute. After analysing the implementation of these two rights at the domestic level, the progressive development of victims' participatory rights in criminal proceedings of various criminal systems, including those where victims have not been traditionally considered as parties, will be discussed. Although, as stated above, victims' participation cannot be considered a component of the right to justice, the progressive introduction of victims' participatory rights in criminal proceedings represents an acknowledgement of the need to take into account the views of victims and, at the very least, that victims have legitimate interests in the outcome of the proceedings.

In the long term, it is equally conceivable that some form of participatory rights may be developed as an integral component of victims' right to justice. This is so for two main reasons: first, some of the international instruments affirming victims' participatory rights in criminal proceedings are binding on states parties, such as the Framework decisions adopted by the European Union.⁴⁹ Second, the current approach of human rights supervisory bodies is inconsistent with their practice of affirming a right to justice as a component of the right to remedy for victims of gross violations of human rights. To elaborate, whereas these bodies have argued that victims may have a right to see perpetrators prosecuted and punished, they have been reluctant to recognise victims' corresponding procedural rights in the criminal process — an inconsistency which may raise an issue under the provisions on the right to an effective remedy. As such, it can be expected that in the coming years human rights supervisory bodies will attempt to address this inconsistency, perhaps by recognising victim's participatory rights in proceedings in conformity with emerging international legal standards.⁵⁰

⁴⁸ *Question of the Impunity of Perpetrators of Human Rights Violations*, *supra* note no. 14, § 27; Council of Europe, Committee of Ministers, *Recommendation R. (2000) 19 of the Committee of Ministers to Member States on the Role of Public Prosecution in the Criminal Justice System*, 6 October 2000, § 34.

⁴⁹ E.g., *Council Framework Decision on the Standing of Victims in Criminal Proceedings*, *supra* note no. 46. In the *Pupino* case, the European Court of Justice held that even though the EU Framework Decisions have no direct effect (pursuant to Art. 34(2)(b) sentence 2 of the Maastricht Treaty), they may indirectly influence the criminal process, since national courts are under an obligation to interpret criminal procedural law in conformity with them. *Maria Pupino*, Case C-105/03, 16 June 2005, § 34.

⁵⁰ S. Trechsel, *Human Rights in Criminal Proceedings* (Oxford: Oxford University Press, 2005), at 37.

2.4 The Role of Victims and Their Rights before International and Internationalized Criminal Tribunals

The legal position of victims in international criminal law has been significantly transformed in the last few decades. Until recently, victims were not granted an independent role in the procedure of international criminal tribunals, that is the possibility to participate in their own right in the proceedings. As stated above, victims were largely excluded from the proceedings before the international military tribunals established in the aftermath of World War II as a result of the mainly adversarial procedure adopted by these tribunals and because the majority of the cases brought before these tribunals were made out almost entirely on the basis of documentary evidence.⁵¹

Similarly, the ad hoc Tribunals established in the early nineties, the International Criminal Tribunal for the former Yugoslavia ('ICTY') and the International Criminal Tribunal for Rwanda ('ICTR'), adopted a largely adversarial approach to their procedure with the prosecutor being entrusted with the mandate of representing the interests of the international community including those of the victims.⁵² Consequently, despite the developments that have occurred in the meantime in relation to the rights of victims in domestic criminal proceedings,⁵³ no independent role in the proceedings was assigned to those harmed by the crimes under the scrutiny of the ad hoc Tribunals, other than that of witnesses. Similarly, in conformity with the judicial model adopted, victims could not seek reparation for the harm they had suffered before the Tribunals.⁵⁴

It was only in the late nineties, with the adoption of the Rome Statute which established the ICC, that mechanisms for victims' redress began to be incorporated into the framework of international criminal justice. The introduction of a victims' participation and reparation scheme within the ICC, followed by similar initiatives by the ECCC and the STL

⁵¹ Y. Danieli, 'Reappraising the Nuremberg Trials and Their Legacy: The Role of Victims in International Law', 27 *Cardozo Law Review* (2006) 1633-1649, at 1641.

⁵² For a critical appraisal of the representation of victims' concerns by the ICTY prosecutor, see e.g. M.-B. Dembour and E. Haslam, 'Silencing Hearings? Victim-Witnesses at War Crimes Trials', 15 *EJIL* (2004) 151-177.

⁵³ See *supra* Section 2.3.

⁵⁴ The Tribunals may, however, order restitution of property 'acquired by criminal conduct' (see Arts 24(1) and 23(1) of the ICTY and ICTR Statutes respectively). On the implementation of the ad hoc Tribunals restitution provisions, see I. Bottiglieri, *Redress for Victims of Crimes under International Law* (Leiden: Martinus Nijhoff Publishers, 2004) at 202-209. In 2000, upon request of the Office of the Prosecutor, the proposal of entrusting the Tribunal with the mandate of awarding compensation to victims was considered by the ICTY judges, but it was ultimately rejected. See *Victims' Compensation and Participation*, Appendix to UN Doc. S/2000/1063, Judges' Report of 13 September 2000.

has been hailed as unprecedented instruments designed to give victims of gross violations of human rights and humanitarian law a voice and to promote reconciliation.⁵⁵

It has rightly been observed that the creation of a regime of victims' redress in international criminal law to deal with the harm suffered by individual victims is not an obvious extension of the mandate of international criminal tribunals.⁵⁶ It is argued that the rationale for the creation of such regimes is to be found in a significant shift in the notion of victims' right to remedy, as observed above, demanding prosecution and punishment of offenders as integral elements of such right.

Indeed, a close inspection of the legal rationale associated with victims' participation reveals that international and internationalized criminal courts have read the exercise of this right as linked to the effective realisation of other victims' rights such as the right to justice and the right to truth,⁵⁷ consistently with emerging human rights standards. The recent decision by the ICC Trial Chamber on the principles and procedures of reparation in the *Lubanga* case,⁵⁸ for example, seems to suggest that the prosecution and punishment of perpetrators is not simply a legitimate interest of the victims, but also their right. More precisely, the Chamber affirmed: 'The conviction and the sentence of the Court are examples of reparations, given that they are likely to have significance for the victims, their families and communities.'⁵⁹

Therefore, these courts appear to confirm what has been increasingly developed in the regime of international human rights law, that is the existence of a victim's right to justice. As such, one may argue that the procedure of international criminal trials – originally based on the 'duel' between the prosecution and the defence – has been transformed, introducing victims as parties or participants in the proceedings with the aim of taking into account the development of a victim's right to justice in cases of gross violations of human rights and international crimes. This logically entails the need to incorporate victims' voices in the criminal process through some form of participation. And indeed providing for participation

⁵⁵ E. Haslam, 'Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience?', in D. McGoldrick, P. Rowe and E. Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Oxford; Portland, Oregon: Hart Publishing, 2004) 315-334, at 315.

⁵⁶ C. McCarthy, *Reparations and Victim Support in the International Criminal Court* (Cambridge: Cambridge University Press, 2012), at 36-48.

⁵⁷ See e.g., ICC, Decision on Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, *Situation in the Democratic Republic of the Congo* ('DRC') (ICC-01/04-101/tEN-Corr), Pre-Trial Chamber ('PTC') I, 17 January 2006, § 63; ECCC, Directions on Unrepresented Civil Parties' Rights to Address the Pre-Trial Chamber in Person, *Ieng Sary* (C22-I-69), PTC, 29 August 2009, § 8.

⁵⁸ ICC, Decision Establishing the Principles and Procedures to Be Applied to Reparations, *Thomas Lubanga Dyilo* ('Lubanga') (ICC-01/04-01/06-2904), Trial Chamber ('TC') I, 7 August 2012.

⁵⁹ *Ibid.*, § 237.

of victims has emerged as a component of international and internationalized criminal courts' mandate alongside ensuring the criminal accountability of wrongdoers.

3 THE SIGNIFICANCE OF THE RESEARCH TOPIC AND ITS FOCUS ON VICTIM'S PARTICIPATION IN INTERNATIONAL CRIMINAL PROCEEDINGS

The central question I shall answer in this thesis reads as follows: *Is a right to justice emerging as an integral component of victims' reparation for gross violations of human rights?* This question can be divided into two sub-questions: (i) is the criminal accountability of wrongdoers an integral element of reparation for victims of gross violations of human rights?, and (ii) are victims entitled to exercise procedural rights in criminal proceedings in order to enforce their right to justice?

The proposed research question offers the chance to analyse a number of significant developments that have occurred in the few last decades in relation to victim's rights in different branches of public international law including international human rights law, international humanitarian law and international criminal law. In particular, as mentioned above, it will be argued that these developments are interconnected and reflect the emergence of a victim's right to justice as an integral component of reparation in cases of gross human rights violations. Consequently, the choice has been made to focus on the impact of the emergence of a right to justice on the role and the rights of victims in the proceedings before recently established international and internationalized criminal tribunals. This choice was made for three main reasons.

First, as also indicated above, the introduction of a victim's participation schemes in the procedure of recently established international and internationalized criminal tribunals represents the most recent and significant development that has occurred in relation to the rights of victims of mass atrocities and, as such, it may be considered as the capstone of a series of developments that have occurred throughout the last few decades on that matter.

Second, notwithstanding the fact that it is primarily for states to implement the rights of victims, including in the area of investigation and prosecution of human rights offenders, often international criminal courts and tribunals are the only forum where victims can make their voice heard. This is so because in situation of mass atrocities, domestic courts often suffer from systemic failures that impede them from effectively investigating and prosecuting international crimes. In other cases, states may be simply unwilling to initiate a criminal action against those allegedly responsible for the crimes. From this perspective, the establishment of international or hybrid criminal tribunals become a means not only to fight impunity of international crimes but also to provide justice to victims of atrocities. Arguably, the inclusion of justice for victims in the mandate of international criminal tribunals may also

contribute to fostering the legitimacy of these bodies, as will be argued throughout the thesis.

Finally, the introduction of victim's participation schemes in the procedure of recently established international and internationalized criminal tribunals may contribute to the emergence of international legal standards on the role victims ought to play in criminal proceedings and the rights they should be granted. From this perspective, victim's participatory rights at the international criminal law level may also influence, in the long run, the advancement and the quality of justice provided at the national level. Indeed, in affirming that international criminal courts will not only focus on the accountability of offenders, but will also take care of victims' interests, the message has been sent to other *fora*, including domestic criminal courts, to adopt new procedures that depart from strictly retributive theories on the nature of criminal offences and on the objectives of criminal trials.

4 METHODOLOGY

In order to answer to the research question discussed above, this thesis adopts an integrated approach, analysing all the relevant primary sources addressing the issue of victims' right to remedy in cases of gross human rights violations (including treaties and resolutions, judgments, decisions, reports, *travaux préparatoires*) as well legal doctrine on the topic. The purpose is not to argue in favour of victims' rights generally but to take stock of existing standards and to consider whether and to what extent criminal justice is considered as an element of victims' right to remedy. Accordingly, this thesis does not start from a normative position, but from a *de lege lata* perspective.

Existing standards on victims' right to remedy are elaborated from a detailed representation of the relevant provisions and the jurisprudence of human rights supervisory bodies, in particular the Human Rights Committee, the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Commission on Human and Peoples' Rights. This is so despite the fact only a few international legal instruments deal specifically with the right to remedy for victims of gross human rights violations and those existing have no binding value upon states. Nevertheless, the practice of human rights supervisory bodies has frequently dealt with claims of these types of violations and with the remedies that are owed to victims. A comparative analysis of the case law of these bodies will consequently be provided with a view to ascertaining whether common standards in relation to victims' right to remedy can be identified when similar circumstances (such as gross violations) are at stake. Furthermore, the choice has been made to present the relevant case law in chronological order, so as to assess whether certain trends are emerging and, in particular, whether certain legal rationales have been progressively abandoned or adopted by other *fora*.

Once standards on victims' right to remedy in cases of gross violations of human rights have been identified, this thesis will question whether such standards have an impact on the role and the rights of victims in criminal proceedings, both at the domestic and at the international level. As far as domestic criminal proceedings are concerned, human rights standards will be compared with criminal procedures of several domestic systems. It must be noted that the purpose of this comparison is not to provide a complete comparative analysis of victims' rights in domestic criminal proceedings. Rather, the purpose of the comparison is limited to assessing whether there is, at the least, a tendency in domestic systems to adopt procedures that enable victims to exercise their right to justice in conformity with human

rights standards. To this end, it will be particularly important to take into consideration the legislative developments that have occurred in procedural systems that have not traditionally granted victims any right in criminal proceedings.

Finally, human rights standards regarding redress for victims of gross human rights violations will be contrasted with the procedure adopted by international and internationalized criminal tribunals. Such a comparison aims at assessing whether the creation of a regime of victims' participation and redress within international and internationalized criminal tribunals is consistent with the principle of a right to justice that has emerged under international law for victims of gross human rights violations. To this end, a comprehensive interpretation and evaluation of the relevant legal framework and case law of international and internationalized criminal tribunals will be offered. As with the practice of human rights bodies, a comparative approach will be adopted to analyse the practice of international and internationalized criminal tribunals. The reason for this comparative analysis is the number of similarities between the victim participation schemes adopted by international and internationalized criminal tribunals and the way in which they are implemented by the courts. As such, the ultimate aim is to understand the extent to which, notwithstanding the distinct procedural characteristics, these similarities reflect the emergence of a set of core rights to which victims are entitled in the context of international criminal proceedings and which indicate the development of a victim's right to justice at the international level.

5 ROADMAP

The present thesis is divided into six chapters together with an introduction and a conclusion.

Chapter I seeks to understand whether a distinct regime for redress exists with regard to victims of gross violations of human rights and international crimes and, if so, what the main features of this regime are. More specifically, through an examination of the international normative framework, as well as of the judicial and quasi-judicial practice of human rights supervisory bodies, this Chapter addresses two main questions. First, it addresses the question of how individuals have been gradually considered not only as the ultimate beneficiaries of the obligation to provide reparation, but also as the direct holders of a corresponding right will be assessed. After providing, as a preliminary matter, an overview of the traditional position of individuals with regard to the invocation of the responsibility of a state in respect of a wrongful act, this Chapter will examine how the legal and institutional framework of international human rights law has expanded the scope of redress available to individuals, setting forth an individual right to an effective remedy. Second, it will analyse how provisions on redress have been interpreted in cases of gross human violations, with a view to establishing whether distinct characteristics can be identified and ultimately whether a distinct redress regime has emerged in relation to these types of violations.

Chapter II provides a general framework on how the concept of the victim has developed in international law, with particular reference to victims of gross violations of human rights and international crimes. In situations characterised by systematic and gross human rights violations, a large number of human beings may potentially be affected and all of them would in principle be entitled to be recognised as victims. A tension may, however, arise when the recognition of victim status is associated with certain procedural rights, such as the right to participate in criminal proceedings or the right to claim reparation. Before analysing in greater detail how victims' rights have emerged in international law, it is necessary to clarify exactly who the subjects entitled to these rights are and whether different categories of victims can be identified. To this end, after considering the principal scholarly works in victimology that have conceptualised victimhood,⁶⁰ an extensive analysis of how the victim is defined in existing victims' rights instruments will be offered, with particular attention paid to those instruments addressing the rights of victims of gross violations of

⁶⁰ E.g., K. McEvoy and K. McConnachie, 'Victimology in Transitional Justice: Victimhood, Innocence and Hierarchy', 9 *European Journal of Criminology* (2012) 527-538; J. Dignan, *Understanding Victims and Restorative Justice* (Berkshire: Open University Press, 2005).

human rights and international humanitarian law.⁶¹ Furthermore, a review of the relevant judicial and quasi-judicial practice of human rights supervisory bodies, international and internationalized criminal tribunals, and other competent *fora* which have dealt with victims' redress (such as the UN Compensation Commission ('UNCC'), and the Ethiopia-Eritrea Claims Commission ('EECC')) will be provided.

Chapter III will determine whether a right to justice, understood as the right to have human rights offenders prosecuted and, if found guilty, punished, is now being developed as a necessary element of the right to remedy for victims of gross human rights violations. Two elements will be considered in this regard: first, whether the international legal instruments and the practice of international human rights bodies have affirmed the prosecution and punishment of offenders as an individual right; second, whether the relevant legal and institutional practice have found that the adoption of measures impeding the criminal prosecution or punishment of offenders (such as amnesties, pardons, statutes of limitation) are not only in violation of a state's obligation but also of an individual right.

Chapter IV analyses the main obstacles to the prosecution of perpetrators of international crimes, namely immunities of state officials from foreign criminal jurisdictions, amnesties, statutory limitations, and the principle of non-retroactivity of criminal law. Plainly, these obstacles to prosecution may ultimately hinder the effective exercise of victim's right to justice. It is hence worthwhile questioning whether the validity of the obstacles to prosecutions has been progressively reduced, both in order to comply with international obligations of states and to allow victims to effectively exercise their right to justice. To this purpose, this Chapter will present the main obstacles to national and international prosecutions of international crimes and for each of them it will question: (i) whether rules of international law exist or are emerging reducing the validity of these obstacles, and (ii) whether this evolution has been influenced by the progressive affirmation of a victim's right to justice in cases of international crimes and gross violations of human rights.

Chapter V questions the emergence of an international norm granting victims standing in criminal proceedings as a means to enforce their right to justice. In particular, the emergence of such a norm will be considered by analysing: (i) the international instruments and case law affirming the inherent value of victims' participation in criminal proceedings,

⁶¹ E.g., UN GA, *Basic Principles and Guidelines on the Right to Restitution, Compensation and Rehabilitation, for Victims of Gross Violations of Human Rights and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, 16 December 2005, § 8: '[V]ictims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law.'

particularly in cases of gross violations of human rights, and (ii) the role and rights of victims in criminal procedure in the law and practice of several domestic jurisdictions. Special attention will be devoted to the impact of emerging international legal standards on victims' rights in criminal proceedings.

Finally, *Chapter VI* offers an analysis of the practice of international and internationalized criminal tribunals in relation to victims' rights. After having reviewed the developments that have occurred during the last few decades in relation to the position of victims in international criminal justice, this Chapter aims to clarify whether the procedure of international criminal trials – originally based on a 'duel' between the prosecution and the defence – has developed, entrusting victims with the right to participate in the proceedings (with the aim of taking into account the affirmation of a victims' right to justice in cases of gross violations of human rights law). This entails that, alongside the criminal accountability of wrongdoers, the need to incorporate victims' voices in the criminal process through some forms of participation has emerged as a component of these courts' mandate.

Chapter I

A Distinct Redress Regime for Victims of Gross Violations of Human Rights and International Crimes

1 INTRODUCTION

Despite the widespread abuses of rights of recent history, very little effort has been made to address the needs of victims and to provide redress for the harm they have suffered. The neglect of victims of mass atrocities has its roots primarily in the fact that states have historically had a monopoly as the only subjects of rights under international law.¹ Accordingly, as wrongful acts were committed and reparation programmes instituted this was considered as a matter of inter-state relations and inter-state responsibility;² hence, individuals were left entirely at the mercy of the discretionary intermediation of their nation state for their protection. Moreover, especially in the aftermath of a conflict, provisions of remedy or reparation have often been understood by the violating regime as well as the wronged state as ‘a bargaining chip rather than an affirmative duty’.³

Nevertheless, the law and practice of the last few decades show a gradual affirmation of a norm in support of victims’ redress for violations of their rights in various fields of international law, particularly in the regime of international human rights law.

At the same time, however, as pointed out by Theo van Boven, it is increasingly acknowledged that ‘gross violations of human rights are by their very nature irreparable and any remedy would fail to repair the grave injury inflicted to the victims, especially when the violations have been committed on a massive scale’.⁴ Arguably, the aim of this contention is

¹ The positivist definition of international law has had a considerable impact on the qualification of individuals as subjects of international law. For instance, Brierly wrote: ‘The Law of Nations, or International Law, may be defined as the body of rules and principles of action which are binding upon civilized States in their relation with one other.’ J.L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, revised by A. Waldock, 6th ed. (Oxford: Clarendon Press, 1963), at 1.

² For a thorough review of the traditional approach to reparation for international wrongful acts, see R.M. Buxbaum, ‘A Legal History of International Reparations’, 23 *Berkeley Journal of International Law* (2005) 314-346.

³ M. Cherif Bassiouni, ‘Accountability for Violations of International Humanitarian Law’, in *Idem* (ed.), *Post-Conflict Justice* (Ardsley, New York: Transnational Publishers, 2002) 3-54, at 38.

⁴ Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross*

not to nullify the basic legal principle of the redress of wrongs; rather, it suggests that remedies for this type of violation should be found outside the traditional categories of reparation. In this regard, a trend can be detected in the law and practice of international human rights law where principles and standards on redress for victims of particularly serious human rights violations have emerged. Indeed, recent international human rights adjudications on serious violations have clarified the content and the scope of victims' right to redress signalling, in particular, a gradual expansion beyond traditional forms of reparation (typically monetary compensation) to encompass, where appropriate, symbolic measures of reparation.

In order to appreciate the current status of victims' redress, particularly in the context of gross human rights violations, this Chapter explores two main issues. First, it will assess how individuals have been gradually considered not only the ultimate beneficiaries of the obligation to provide reparation but also the direct holders of a corresponding right under international law. Second, it will analyse how provisions on redress have been interpreted in cases of gross human violations with a view to establishing whether distinct characteristics can be identified and thus whether ultimately a distinct redress regime has emerged in relation to violations of this kind.

2 THE BROADER LEGAL FRAMEWORK OF REDRESS FOR VICTIMS OF INTERNATIONAL WRONGFUL ACTS

Redress of wrongs is a fundamental legal principle that is recognised and applied in almost all legal systems.⁵ Nonetheless, until recently, individual reparation for damages suffered as a consequence of an international wrongful act was not considered a proper concern of international law. The centrality of states as major subjects of international law, attributable to the substantial affirmation of positivist theories, has in fact had major impact on access to reparation measures for individuals.⁶ In short, the responsibility for internationally wrongful acts committed and the remedies sought were considered a matter for states alone. The prevalence of the positivist doctrine according to which individuals and subjects other than states have no rights under international law⁷ has remained unchallenged until relatively recently.⁸

However, principles and standards emerging from recent domestic and international practice on remedies show a clear trend developing in many areas of international law, particularly in international human rights law, that places individuals in a more central position; a process that has been referred to as the ‘humanization of international law.’⁹ More precisely, it would appear that the international community is moving beyond the traditional framework of inter-state reparations and increasingly recognising that the obligations assumed by a state under international human rights law or international humanitarian law entail consequences not only vis-à-vis other states but also with respect to individuals. International

⁵ For an overview of the right to remedy in national legal systems, see D. Shelton, *Remedies in International Human Rights Law* (Oxford: Oxford University Press, 2005), at 23-49. For an historical reconstruction of the right to remedy, see I. Bottigliero, *Redress for Victims of Crimes Under International Law* (Leiden: Martinus Nijhoff Publishers, 2004), at 13-38.

⁶ F. Francioni, ‘The Rights of Access to Justice Under Customary International Law’, in *Idem* (ed.), *Access to Justice as a Human Right* (Oxford: Oxford University Press, 2007) 1-55, 5-8.

⁷ D. Anzilotti, ‘La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers’, 13 *Revue générale de droit international public* (1906) 5-28; G. Morelli, *Nozioni di diritto internazionale*, 7th ed. (Padua: CEDAM, 1967), at 116 ff.; G. Arangio-Ruiz, ‘L’individuo e il diritto internazionale’ (1971) *Rivista di diritto internazionale* 563, at 590 ff.; A. McNair, *The Law of Treaties*, 2nd ed. (Oxford: Clarendon Press, 1961), at 322 ff.; R. Quadri, *Diritto internazionale pubblico*, 5th ed. (Napoli: Liguori editore, 1989), at 398 ff. In favour of a greater role of individuals in international law: G. Balladore Pallieri, *Diritto internazionale pubblico*, 8th ed. (Milano: Giuffrè, 1962), at 215 ff.; G. Sperduti, *L’individuo nel diritto internazionale* (Milano: Giuffrè, 1950), at 101 ff. In favour of the international personality of individuals: N. Politis, *Les nouvelles tendances du droit international* (Paris: Hachette, 1927), at 44 ss.; G. Scelle, *Précis de droits des gens* (Paris: Sirey, 1932), at 7 ss.; P.C. Jessup, *A Modern Law of Nations* (New York: Macmillan, 1948), at 15 ss.; H. Lauterpacht, *International Law and Human Rights* (London: Steven and Sons, 1950), at 27 ss.

⁸ A. Randelzhofer, ‘The Legal Position of the Individual under Present International Law’, in A. Randelzhofer and C. Tomuschat (eds), *State Responsibility and the Individual: Reparations in Instances of Grave Violations of Human Rights* (The Hague: Martinus Nijhoff Publishers, 1999) 231-242.

⁹ T. Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006).

legal scholars debate, however, whether individuals have a corresponding legal right to claim reparation under international law.¹⁰ In order to understand whether and, in the case of an affirmative answer, how exactly an individual right to reparation under international law has emerged an introductory overview of the traditional approach towards reparation for international wrongful acts is necessary.

2.1 The Traditional Approach of International Law to Victims' Redress

The obligation to make reparation as a consequence of the commission of an international wrongful act is a well-established principle of international law. As early as 1928 the Permanent Court of International Justice ('PCIJ') held that it is a fundamental principle of general international law that the breach of an international obligation 'involves an obligation to make reparation in an adequate form.'¹¹ The Court added that 'reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'.¹²

Traditionally, however, a state-centric approach has been adopted with regards to the access of individuals to reparation measures. Summarising the classical position of individuals who suffered injury through a violation of international law Dionisio Anzilotti wrote that '[l]a conduite d'un Etat, toute contraire qu'elle soit au droit international ne saurait jamais donner naissance à un droit de l'individu à la réparation du dommage souffert'.¹³ Within the traditional framework of international law it was for the state to protect the interests of its citizens when they suffered harm as a result of an international wrongful act. As such, although individuals may receive protection under international law, generally only a state may invoke the responsibility of another state for violations of this body of law.¹⁴ Even

¹⁰ In this sense, Theo van Boven observed: '[I]f states have a responsibility to make reparations to individuals, then individuals have a corresponding right to claim such reparations. It must be assumed that the obligations resulting from state responsibility for breaches of international human rights and humanitarian law entail corresponding rights on the part of individual persons and groups of persons who are under the jurisdiction of the offending State and who are victims of those breaches'. T. van Boven, 'The Perspective of the Victim', in Y. Danieli, E. Stamatopoulou and C. Dias (eds), *The Universal Declaration of Human Rights: Fifty Years and Beyond* (Amityville, New York: Baywood Publishing Company Inc., 1999) 13-26, at 18. See contra A. Randelzhofer, 'The Legal Position of the Individual under Present International Law', *supra* note no. 8.

¹¹ PCIJ, *Case Concerning the Factory at Chorzów* (Germany v. Poland), Jurisdiction, Series A No. 9, 26 July 1927, at 21.

¹² PCIJ, *Case Concerning the Factory at Chorzów* (Germany v. Poland), Merits, Series A No. 17, 13 September 1928, at 29 and 47-48.

¹³ D. Anzilotti, 'La responsabilité internationale des Etats', *supra* note no. 7, at 5.

¹⁴ See International Law Commission ('ILC') *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* ('ILC Draft Articles'), UN Doc. A/RES/56/83, 22 January 2002, Art. 42. But see Art. 33(2) of the ILC Draft Articles, further analysed in Section 2.2 of this Chapter. See also F. Francioni,

today, the common position is that when an individual suffers an injury as a result of a violation of the rules of international law, it is for the state to espouse his or her claim on the international plane.¹⁵

In espousing the claim of its citizens the state is in fact asserting its own rights and not those of the individuals at issue. This doctrine was first expressed in the classic case of the *Mavrommatis Palestine Concessions* where the PCIJ ruled that ‘by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right – its right to ensure in the person of its subjects, respect for the rules of international law.’¹⁶ A consequence of this approach is that the state of nationality of the alien can dispose of its right to espouse the claim for reparation, presumably on the basis of political, financial or strategic considerations, a point to which we shall return in the next subsection. In other words, the alien’s state of nationality is never under the obligation to espouse the claim; likewise, it does not have an obligation under international law to distribute any compensation it receives from a responsible state to the harmed individuals.¹⁷

Two examples can be provided in order to better illustrate the traditional approach, firstly to the treatment of aliens, and secondly the protection of individuals vis-à-vis the conduct of states in the context of armed conflicts.

2.1.1 *The Law of State Responsibility for Injuries to Aliens*

As is well known, under the law of state responsibility for injuries to aliens, an individual who claims to be a victim of a wrongful act abroad, in the event of lack or inadequacy of local remedies, can ask for the protection of his state. The state, in turn, may take up its national’s

‘Reparation for Indigenous Peoples: Is International Law Ready to Ensure Redress for Historical Injustices?’, in F. Lenzerini (ed.), *Reparations for Indigenous Peoples: International & Comparative Perspectives* (Oxford: Oxford University Press, 2008) 27-45.

¹⁵ See ILC, *Draft Articles on Diplomatic Protection*, UN Doc. A/61/10, 6 December 2007, Art. 2. For a comprehensive examination of the law and practice of diplomatic protection, see C.F. Amerasinghe, *Diplomatic Protection* (Oxford: Oxford University Press, 2008).

¹⁶ PCIJ, *The Mavrommatis Palestine Concessions*, Series A No. 2, 30 August 1924, at 12.

¹⁷ For instance, the International Court of Justice (‘ICJ’) in the *Germany v. Italy* case, held that: ‘Where the State receiving funds as part of what was intended as a comprehensive settlement in the aftermath of an armed conflict has elected to use those funds to rebuild its national economy and infrastructure, rather than distributing them to individual victims amongst its nationals, it is difficult to see why the fact that those individuals had not received a share in the money should be a reason for entitling them to claim against the State that had transferred money to their State of nationality.’ ICJ, *Jurisdictional Immunities of the State* (Germany v. Italy: Greece Intervening), 3 February 2012, § 102. Cf. Article 19(c), *Draft Articles on Diplomatic Protection*, *supra* note no. 15, indicating the disbursement of compensation by an injured state to persons harmed by the internationally wrongful act as a recommended practice.

claim through diplomatic protection on the basis of an alleged denial of justice.¹⁸ As observed above, it is generally agreed that the claim of the state of nationality is not based on the injury suffered by the individual victim but on the violation of the international duty to respect certain rights of aliens owed to the state of nationality of the alien by the host state.¹⁹

The protection of aliens by their states was first theorised in terms of diplomatic protection by Emer de Vattel. His famous quote, dating back to 1758, reads: ‘Quiconque maltraite un citoyen offense indirectement l’Etat, qui doit protéger ce citoyen’.²⁰ A review of the arbitrations from the early creation of a body of international rules on the treatment of aliens until the end of the last century indicates that the majority of international legal claims concerned the treatment of aliens.²¹ Furthermore, a number of arbitrations and claims commissions have been established following injury to nationals of the United States of America or of other European states in countries such as Venezuela,²² Mexico²³ and El Salvador.²⁴

In recent years, international claims based on violations of the rules on the treatment of aliens have become less common,²⁵ mainly as a result of the emergence of other branches of international law better suited to deal with these cases such as international human rights law.²⁶ In general terms, the extent to which the law on the treatment of aliens deals with victims of serious breaches rights is today rather limited for two main reasons. First, the right to diplomatic protection principally aims at safeguarding and promoting the general interest of the state and not those of the direct victims. The existence of a paramount interest of the state as the legal basis for international claims is confirmed by the full control exercised by the victim’s state of nationality over the claim and by the discretionary nature of the power the state possesses in espousing the international claim. Consequently, individual interests can be protected and promoted in the international legal order only through the action in diplomatic

¹⁸ C.F. Amerasinghe, *Diplomatic Protection*, *supra* note 15, at 21-27.

¹⁹ *Ibid.*, at 23-25.

²⁰ E. de Vattel, *Le Droit des gens: Principes de la loi naturelle, appliqués à la conduite et aux affaires des Nations et des Souverains*, vol. 2 (London: 1758), section 71.

²¹ A. Stuyt, *Survey of International Arbitrations 1794-1970* (Leiden, Oceana Publications, 1972).

²² *Protocol Between the United States of America and Venezuela for Arbitration of All Unsettled Claims*, 17 February 1903, 9 *Reports of International Arbitral Awards* 115.

²³ *Special Claims Convention for the Settlement of Claims of American Citizens Arising from Revolutionary Acts on Mexico*, 10 September 1923, 4 *Reports of International Arbitral Awards* 773.

²⁴ *Protocol between the United States and the Republic of Salvador for the Arbitration of Certain Claims*, 19 December 1901, 15 *Reports of International Arbitral Awards* 459.

²⁵ This branch of law remains important in affording protection to legal persons in respect of their property, including foreign investments. See J. Paulsson, *Denial of Justice in International Law* (Cambridge: Cambridge University Press, 2005).

²⁶ C.F. Amerasinghe, *Diplomatic Protection*, *supra* note 15, at 75-78.

protection of their state of nationality and insofar as they correspond with the state interests.²⁷ Second, the limited role of state responsibility for injuries to aliens is also due to the fact that, by definition, this body of law is only concerned with the ill-treatment of a citizen by a foreign state and not with that carried out by the individual's state of nationality.

2.1.2 Victims' Reparation under International Humanitarian Law

An explicit reference to the principle that a violation of international humanitarian law ('IHL') entails the obligation to make reparation was made in 1907 in Article 3 of the Hague Convention (IV) Respecting the Laws and Customs of War on Land. This provision obliges belligerent parties violating the provisions of the regulations annexed to the Convention to pay compensation on an inter-state basis, and further provides that a belligerent party is responsible for all acts committed by persons forming part of its armed forces. The substance of Article 3, which is generally accepted as customary international law,²⁸ has also been included in Article 91 of Additional Protocol I to the Geneva Conventions.²⁹

In spite of the fact that the primary objective of IHL is indisputably the protection of individuals, the standing of individuals as holders of a right to reparation for war damages, pursuant to the provisions mentioned above, has traditionally been rather weak.³⁰ In keeping with the law of diplomatic protection, for individuals to receive compensation for violations of international humanitarian law it is necessary for their state of nationality to invoke the responsibility of the wrongful state on their behalf. Plainly, the injured state could also forfeit its right to claim reparation or accept less than the full reparation. This explains both the

²⁷ On the relationship between state and individual interests in the law of diplomatic protection see G. Strozzi, *Interessi statali e interessi privati nell'ordinamento internazionale. La funzione del previo esaurimento dei ricorsi interni* (Milano: Giuffrè, 1977), at 260-266.

²⁸ Y. Sandoz, C. Swinarski and B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: International Committee of the Red Cross, 1987), 'Commentary on Article 91', at 1053, § 3645. Note should also be taken of articles 51, 52, 131 and 148 of the four Geneva Conventions of 1949 which state: 'No High Contracting Party shall be allowed to absolve itself or any other High Contracting Part of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article' [referring to grave breaches].

²⁹ Art. 91 of Additional Protocol I reads: 'A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces'.

³⁰ Individuals were granted the right to claim property rights against a foreign state before the International Prize Court, established by Hague Convention No. XII of 1907, which never entered into force. However, individuals were prevented from bringing claims if the state of nationality decided to take over the claim (arts. 4 and 5 of the Hague Convention). In the Treaty of Versailles, individuals of the Allied and Associated Powers could bring claims against Germany through a mixed arbitral tribunal (Treaty of Versailles, 28 June 1919, art. 304(b) of Section VI). For a reconstruction of the early practice on individual access to international remedies, see F. Francioni, 'The Rights of Access to Justice Under Customary International Law', *supra* note no. 6, at 15-19. On the access of individuals to remedies for violations of IHL, see L. Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law', 85 *International Review of the Red Cross* (2003) 497-526.

practice of lump-sum agreements at the end of a conflict,³¹ and of those peace settlements pursuant to which the vanquished state renounces its right *per se*, as well as its citizens, to any reparation or claim against the victor for the damages suffered during wartime.³²

Furthermore, the majority of cases brought before domestic courts relating to claims for compensation for harm suffered during the Second World War show that those claims were most often rejected, either on the basis that the right to seek compensation was waived by peace treaties concluded between states³³ or that the right to seek compensation could not be exercised directly by individuals.³⁴

Nonetheless, as discussed in the next sub-section, in the past two decades the position of individuals under IHL has undergone impressive development with evident consequences for the access of individuals to reparation measures.

2.2 Recent Developments in Reparation for Victims of International Wrongful Acts and Violations of IHL: Towards the Affirmation of an Individual Right to Reparation?

The conception of reparation as a purely inter-state matter has been substantially challenged in the post-Second World War era. As the next sections will further examine, the advent of international human rights law has greatly contributed to the emergence of individuals as the holders of rights under international law and has progressively eroded the primacy of state interests and prerogatives in many respects. This has also had an impact on the consequences of international wrongful acts and, more precisely, it has considerably broadened the range of beneficiaries of the state obligation to make reparation in case of a breach of an international obligation.

This recent trend is evidenced, *inter alia*, by the Draft Articles on the Responsibility of States for International Wrongful Acts, adopted by the UN International Law Commission in

³¹ For numerous examples of such agreements, see J.-M. Henckaerts, L. Doswald-Beck and C. Alvermann, *Customary International Humanitarian Law*, vol. I (Cambridge: Cambridge University Press, 2005), at 539.

³² For example, the Treaty of Peace with Japan states at Art. 14(b): 'Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation'. *Treaty of Peace with Japan*, 3 U.S.T. 3169, 136 U.N.T.S., 8 September 1951, at 64.

³³ E.g., Tokyo District Court, *Shimoda*, 7 December 1963, reprinted in 8 *The Japanese Annual of International Law* (1964) 212-252.

³⁴ This approach is reflected in a number of judgments by Japanese courts which have consistently rejected compensation claims by Chinese nationals for atrocities suffered during the Second World War. For example, on 27 July 1995, the Tokyo District Court concluded that 'neither the general practice nor the conviction (*opinio juris*) that the state has a duty to pay damages to each individual when that State infringes its obligations under international human rights or international humanitarian law can be said to exist.' See Tokyo District Court, *X et al. v. the State*, 27 July 1995, reprinted in 39 *The Japanese Annual of International Law* (1996) 265-266.

2001. Despite the fact that the Articles were designed in the context of inter-state relations and therefore focus on the responsibility of a state vis-à-vis another state, they do not rule out that individuals, or other entities different from a state may be the holders of rights under international law.

Paragraph 2 of Article 33 of the ILC Draft Articles, which deals with the scope of the obligation to make reparation affirms that: ‘This Part is without prejudice to any rights, arising from the international responsibility of a state, which may accrue directly to any person or entity other than a state.’³⁵ As specified by the ILC in the Commentary to the Draft Articles, this wording recognises the possibility that state responsibility may arise from the breach of a primary obligation owed to a non-state entity, including individuals.³⁶ This is the case, as the Commentary explains, with regard to treaties for the protection of human rights but it is not limited to them. Although the Draft Articles do not deal explicitly with the possibility of non-state entities invoking state responsibility³⁷ it is nonetheless remarkable that the Commentary to the Draft Articles specifies that individuals may potentially be considered holders of rights, including the right to invoke state responsibility (and hence, to claim reparation), where there is a procedure available to that effect.³⁸

In the past two decades, the position of individuals under IHL has also undergone impressive development. As briefly examined above, since the rules of this body of law were conceived as applicable between states only, traditionally individuals have not been recognised as having rights, including the right to reparation. Nevertheless it has been noted that some of the decisions which have rejected individual claims for reparation grounded their reasoning in rules of general international law as they existed at the time of the events of the particular case. As such, this leaves open the possibility that a different approach could be adopted were a case to be brought in relation to events occurred in present times, given the development in the law³⁹ Furthermore, recently some domestic courts have started to accept

³⁵ Recognition that beneficiaries may be subjects other than states can also be found in Art. 48(2)(B) of the ILC Draft Articles.

³⁶ Commentary to Art. 33 of the ILC Draft Articles, § 4, annexed to the ILC Draft Articles, at 95.

³⁷ In this respect, it has been observed that ‘the Draft Articles were already born old’, see R. Pisillo-Mazzeschi, ‘The Marginal Role of the Individual in the ILC’s Articles on State Responsibility’, 14 *Italian Yearbook of International Law* (2004) 39-52, at 39. On this issue, see also G. Gaja, ‘The Position of Individuals in International Law: An ILC Perspective’, 21 *EJIL* (2010) 11-14.

³⁸ Certain authors have nonetheless called not to overemphasise this provision. In particular, it has been observed that ‘paragraph 2 of Article 33 is a mere saving clause (in a document that is just a draft by a non-state body that has not been formally endorsed but only put to the attention of states for their consideration)’. See N. Ronzitti, ‘Access to Justice and Compensation for Violations of the Law of War’, in F. Francioni (ed.), *Access to Justice as a Human Right*, *supra* note no. 6, 95-134, at 111-112.

³⁹ M. Frulli, ‘When Are States Liable Towards Individuals for Serious Violations of International Humanitarian Law? The Marković Case’, 1 *Journal of International Criminal Justice* (‘JICJ’) (2003) 406-427, at 420.

individual claims against a state for violations of the laws of war, such as in the decision of the Italian Court of Cassation in the *Ferrini* case⁴⁰ and in a series of other cases⁴¹ as well as in the *Distomo* case of the Greek Supreme Court.⁴²

Several experts have increasingly taken the view that the ultimate objective of this body of law is to confer rights directly on individuals.⁴³ This view is supported, according to these authors, by the preparatory works of Art. 3 of the Hague Convention IV.⁴⁴ This approach has also been upheld by the International Committee of the Red Cross, which in its Commentary to Article 91 stated that '[t]hose entitled to compensation will normally be Parties to the conflict or their nationals ... However, since 1945 a tendency has emerged to recognise the exercises of rights by individuals'.⁴⁵

The existence of an individual right to reparation under international law remains, however, contentious. In this respect, Seibert-Fohr noted that 'although recent developments under the international human rights treaties... all provide evidence that there are emerging principles, in the absence of further State practice it is too early to speak of a rule of general international law providing the individual with a right to claim compensation for human rights violations.'⁴⁶ On the other hand, for instance, Hofmann, Co-Rapporteur of the International Law Association ('ILA') Committee on Reparation for Victims of Armed Conflict, found that:

[I]n view of the relevant state practice and taking note of a strong majority among scholars, the Committee came to the conclusion that, until most recently, international law did not provide for any right to reparation for victims of armed conflict. The Committee submits, however, that the situation is changing: there are increasing

⁴⁰ Italian Court of Cassation (Sezioni Unite civili), *Ferrini c. Repubblica Federale di Germania*, Decision No. 5044/2004, 11 March 2004, reprinted in 87 *Rivista di diritto internazionale* (2004) 539-551.

⁴¹ See cases cited in ICJ, *Jurisdictional Immunities of the State*, *supra* note no. 17, §§ 27-29.

⁴² Greek Supreme Court (Areios Pagos), *Prefecture of Voiotia v. Federal Republic of Germany*, Case No. 11/2000, 4 May 2000, reprinted in 129 *International Law Reports* (2007) 513-524.

⁴³ See e.g., F. Kalshoven, 'State Responsibility for Warlike Acts of the Armed Forces: From Article 3 of The Hague Convention IV of 1907 to Article 91 of Additional Protocol I of 1977 and Beyond', 40 *The International and Comparative Law Quarterly* (1991) 827-858, at 847; T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Oxford University Press, 1989), at 224. See also expert opinions by F. Kalshoven, E. David and C. Greenwood, in H. Fujita, I. Suzuki and K. Nagano (eds), *War and the Rights of Individuals* (Tokyo: Nippon Hyoron-sha Co, 1999).

⁴⁴ For a reconstruction of the preparatory works of Art. 3, see M. Frulli, 'When Are States Liable Towards Individuals for Serious Violations of International Humanitarian Law? The Marković Case', *supra* note no. 39, at 416-418. The view that the preparatory works of Article 3 support an individual right to reparation has been adopted by F. Kalshoven, 'Article 3 of the Convention (IV) Respecting the Laws and Customs of War on Land, Signed at The Hague, 18 October 1907', in H. Fujita, I. Suzuki and K. Nagano (eds), *War and the Rights of Individuals*, *supra* note no. 43, at 34-36; see contra A. Gattini, 'To What Extent Are State Immunity and Non-Justiciability Major Hurdles to Individuals' Claims for War Damages?', 1 *JICJ* (2003) 348-367, at 350-351.

⁴⁵ International Committee of the Red Cross ('ICRC'), 'Commentary to Protocol I', §§ 3656-3657, available online at www.icrc.org.

⁴⁶ A. Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (Oxford: Oxford University Press, 2009), at 246.

examples of international bodies proposing, or even recognising, the existence of, or the need to establish, such a right.⁴⁷

Significant examples supporting an emerging consensus towards an individual right to reparation under international law can be found in the practice of UN organs. An important example is provided by the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* ('Principles on Reparation'), adopted by the UN General Assembly in 2005.⁴⁸ Article 15 of the Principles on Reparation sets forth the duty of States to provide for reparation to victims as follows:

In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law.⁴⁹

In commenting on this provision, Van Boven — the then UN Special Rapporteur who, after Bassiouni, was in charge of drafting the Principles — noted that, despite the fact that the Principles were based on the law of state responsibility, it is no longer acceptable to argue that they do not apply to relations between states and individuals. To do so would be to ignore:

[T]he historic evolution since the Second World War of human rights ... [and] that the duty of affording remedies for governmental misconduct was so widely acknowledged that the right to an effective remedy for violations of human rights and a fortiori of gross human rights violations, may be regarded as forming part of customary international law.⁵⁰

Other landmark documents in the UN practice are the final report prepared in 1998 by the Special Rapporteur on 'Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict'⁵¹ and the Report of the International Commission of Inquiry on

⁴⁷ ILA, 'Reparation for Victims of Armed Conflict', The Hague Conference (2010), at 2.

⁴⁸ UN GA, *Basic Principles and Guidelines on the Right to Restitution, Compensation and Rehabilitation, for Victims of Gross Violations of Human Rights and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, 16 December 2005.

⁴⁹ After a long heated debate, the scope of the Principle was restricted to serious violations of international humanitarian law, suggesting that it is only to victims of violations of a certain gravity (i.e. which constitute crimes under international law) that the right to reparation is recognised. See D. Shelton, *Remedies in International Human Rights Law*, *supra* note no. 5, at 151.

⁵⁰ T. Van Boven, *Comment to the Basic Principles*, United Nations Audiovisual Library of International Law, pp. 1-2.

⁵¹ Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict, *Final Report Submitted by Ms. Gay J. McDougall, Special Rapporteur*, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998. This document also refers to the liability of Japan for 'comfort women stations' established during the Second World War (at 38-55).

Darfur submitted to the UN Secretary-General in 2005.⁵² After asserting that gross violations of human rights and international humanitarian law ‘can entail not only the individual criminal liability of the perpetrator but also the international responsibility of the State (or State-like entity) on whose behalf the perpetrator was acting’,⁵³ the Commission on Darfur held that such international responsibility requires that that ‘the State (or the State-like entity) must pay compensation to the victim’.⁵⁴ More specifically, the 2005 Report found that, as a result of the influence of international human rights law on the domain of state responsibility, in contemporary international law there is ‘a strong tendency towards providing compensation not only to States but also to individuals based on State responsibility’.⁵⁵ The Commission on Darfur then concluded that:

[T]he proposition is warranted that at present, whenever a gross breach of human rights is committed which also amounts to an international crime, customary international law not only provides for the criminal liability of the individuals who have committed that breach, but also imposes an obligation on States of which the perpetrators are nationals, or for which they acted as de jure or de facto organs, to make reparation (including compensation) for the damage made.⁵⁶

Reference should also be made to the jurisprudence of the International Court of Justice (ICJ) that, although not having jurisdiction on individual claims, has found that states are responsible for affording reparation to victims of international wrongful acts. After concluding in the *Advisory Opinion on the Wall in Occupied Palestinian Territory* that Israel had violated a number of human rights and IHL obligations, the ICJ held that:

Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned. [...] The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall’s construction.⁵⁷

More recently in the *Diallo* case, concerning the arrest, detention and expulsion from the Democratic Republic of the Congo of a Guinean businessman, the Court went one step

⁵² *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, UN Doc. S/2005/60, 25 January 2005.

⁵³ *Ibid.*, § 593.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, at 151, footnote no. 217.

⁵⁶ *Ibid.*, § 598.

⁵⁷ ICJ, *Legal Consequences of the Construction of a Wall on the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136, 9 July 2004, §152 ff. But see R. O’Keefe, ‘Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: A Commentary’, 37 *Revue Belge de droit international* (2004) 92-154, at 136-140, arguing that the Court’s finding was justified by the fact that the case concerned the unusual situation in which there was no injured state to which reparation could be made.

further by considering the issue of reparation for international wrongful acts as a 'human right' and not (only) as a state right. At first glance, the case appeared to fall within the traditional framework of diplomatic protection (Guinea acting to protect its own citizen), and as such the Court could have limited itself to finding that Guinea's rights had been violated and ordered that certain actions be undertaken to remedy the violation.

However the Court did not follow the traditional approach of the law of diplomatic protection, discussed in the previous sections, but rather focused on the rights of Mr Diallo as an individual. Following the judgment on the merits,⁵⁸ finding that the treatment of Mr Diallo by Guinea had violated certain provisions of the International Covenant on Civil and Political Rights, the Court issued a decision on compensation for the first time in its history.⁵⁹ Importantly, in order to determine the heads of damage and the quantum of compensation, it extensively reviewed the practice of human rights supervisory bodies on individual complaints (including the Human Rights Committee, the African Commission on Human and Peoples' Rights and the European Court of Human Rights).⁶⁰ Arguably, reference to such practice illustrates that reparation is increasingly considered a right enjoyed by individuals even before bodies which have traditionally dealt with reparation from an exclusively inter-state perspective and in cases, such as that of diplomatic protection, which have been generally settled through inter-state arrangements.

Technically, Diallo was not himself awarded reparation. Rather, the responsible state, Guinea, was ordered to pay reparation to the Congo which had brought the case before the ICJ in exercising its right of diplomatic protection. However, as remarked by Judge Cançado-Trindade in his separate opinion, the decision on reparation signals a significant departure from the traditional inter-state perspective. Judge Cançado-Trindade stated:

In effect, in the present case A.S. Diallo, the Court's Judgments on the merits (2010) and now on reparations clearly show that its findings and reasoning have rightly gone well beyond the straight-jacket of the strict inter-State dimension. There are circumstances wherein the Court is bound to do so, in the faithful exercise of its judicial function, in cases concerning distinct aspects of the condition of individuals. After all, breaches of international law are perpetrated not only to the detriment of States, but also to the detriment of human beings,

⁵⁸ ICJ, *Case Concerning Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), Judgment, 30 November 2010, *ICJ Reports* 2010, p. 639. For a comment on this decision, see S. Ghandhi, 'Human Rights and the International Court of Justice: The Ahmadou Sadio Diallo Case' 11 *Human Rights Law Review* (2011) 527-555; M. Andenas, 'International Court of Justice: Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo) Judgement of 30 November 2010' 60 *The International and Comparative Law Quarterly* (2011) 810-819.

⁵⁹ ICJ, *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), Judgment (Compensation owed by the Democratic Republic of the Congo to the Republic of Guinea), 19 June 2012.

⁶⁰ *Ibid.*, §§ 24, 33, 40, 49, 56.

subjects of rights — and bearers of obligations — emanating directly from international law itself. States have lost the monopoly of international legal personality a long time ago.

He continued:

As disclosed by the present case of A.S. Diallo, one is, in sum, faced with a damage done to an individual. He (and not his State of origin) is the subject of the rights breached, he suffered unlawful detention and arbitrary expulsion (from the State of residence), he is the subject of the corresponding right to reparation, and the beneficiary thereof. His case was originally brought before this Court by his State of nationality (in the exercise of diplomatic protection), but, in its decision on the merits (Judgment of 30.11.2010), the Court made clear that the applicable law was the International Law of Human Rights, concerned with the rights of human beings and not at all of States.⁶¹

In recent years, a number of commissions have been established with the aim of providing remedies to victims of violations of IHL that have occurred as a result of international or internal armed conflicts. Two well-known examples are the United Nations Compensation Commission ('UNCC') and the Eritrea-Ethiopia Claims Commission ('EECC'), which are both competent to adjudicate claims by victims of violations of IHL.

Established in 1991 by the UN Security Council,⁶² the UNCC was meant to act as a subsidiary organ of the Compensation Fund, to process claims and pay monetary compensation 'for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait'.⁶³ In establishing the UNCC the UN Security Council departed from the traditional inter-state reparation framework whilst incorporating innovative elements into the UNCC procedure, the most notable being the quasi-independent role of individuals in accessing the compensation scheme.⁶⁴

⁶¹ ICJ, *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), Judgment (Compensation owed by the Democratic Republic of the Congo to the Republic of Guinea), *supra* note no. 59, Separate Opinion of Judge Cançado-Trindade, § 48.

⁶² See UN Security Council ('UN SC') Res. 687, UN Doc. S/Res/687 (1991), 3 April 1991 and UN SC Res. 692, UN Doc. S/Res/692 (1991), 20 May 1991. On the UNCC generally, see J.R. Crook, 'Current Development: The United Nations Compensation Commission – A New Structure to Enforce State Responsibility', 87 *The American Journal of International Law* (1993) 144-157; M. Frigessi di Rattalma and T. Treves (eds), *The United Nations Compensation Commission: A Handbook* (The Hague: Kluwer, 1999); N. Wühler, 'The United Nations Compensation Commission', in A. Randelzhofer and C. Tomuschat (eds), *State Responsibility and the Individual: Reparations in Instances of Grave Violations of Human Rights*, *supra* note no. 8, 213-230.

⁶³ SC Res. 687, *supra* note no. 62, at § 16.

⁶⁴ Individuals and corporate claims must be presented through the claimant's governments (UNCC, Provisional Rules for Claims Procedure, art. 5(1)(a)). Although governments make an initial evaluation of the claims, individual and corporate claimants remain the legitimate holders of the reparation claims. The UNCC also allows governments to present claims coming not only from their nationals, but also from individuals who are resident in their territory, thus going beyond the nationality link, a fundamental element in the framework of diplomatic protection (see e.g., ICJ, *Nottebohm Case* (Liechtenstein v. Guatemala), *ICJ Reports* 1955, p. 4, 6 April 1955). On the departure of the UNCC regime from the traditional framework of diplomatic protection, see P. Malanczuk,

The EECC was established in 2000 by the Eritrea-Ethiopia Peace Agreement.⁶⁵ Pursuant to Article 5(1) of the Agreement between the Governments of the State of Eritrea and of the Federal Democratic Republic of Ethiopia the Commission was set up in order:

[T]o decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party or entities owned or controlled by the other party that are (a) related to the conflict (...), and (b) result from violations of IHL, including the 1949 Geneva Conventions, or other violations of international law.⁶⁶

It should be noted that before both the UNCC and the EECC individuals do not have legal standing, instead having to submit their claims to their government which in turn presents the claims to the competent commission. However, it has been rightly observed that the initial evaluation of claims by the government is a purely administrative process with the individual and corporate claimants as the legitimate holder of reparation claims.⁶⁷

Finally, it is worth mentioning a number of soft-law documents which have been adopted throughout the last decade affirming the right to an effective remedy, the right to compensation for damages and the right to access to justice for victims of violations of international humanitarian law. These documents include the Chicago Principles on Post-Conflict Justice ('Chicago Principles')⁶⁸ and the ILA's Declaration of International Law Principles of Reparation for Victims of Armed Conflict.⁶⁹ The Chicago Principles were prepared over a period of seven years by a group of leading scholars, jurists and members of the civil society to provide 'basic guidelines for designing and implementing policies to address past atrocities'.⁷⁰ Principle 3 deals with victims' right to remedy and reparation in a detailed manner and provides that 'states shall acknowledge the special status of victims, ensure access to justice, and develop remedies and reparation'. Similarly, the ILA Principles on Reparation for Victims of Armed Conflict, at Article 6, sets out that 'victims of armed conflicts have a right to reparation from the responsible parties'. Despite the fact that these instruments are not legally binding and are not as authoritative as the practice of the UN

'International Business and New Rules of State Responsibility? The Law Applied by the United Nations (Security Council) Compensation Commission for Claims Against Iraq', in K.H. Böckstiegel (ed.), *Perspectives of Air Law, Space Law and International Business Law for the Next Century* (Köhl: Carl Heymanns Verlag KG, 1996) 117-145, at 137.

⁶⁵ Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, 12 December 2000, reproduced in 40 *International Legal Materials* (2001) 260-264.

⁶⁶ *Ibid.*, Art. 5.

⁶⁷ See, for example, UN Secretary-General, *Report of the Secretary-General on the Establishment of the UNCC*, UN Doc. S/22559, 2 May 1991, § 21.

⁶⁸ International Human Rights Law Institute, *The Chicago Principles on Post-Conflict Justice*, 2008.

⁶⁹ ILA, *Reparation for Victims of Armed Conflicts*, Resolution 2/2010.

⁷⁰ *Chicago Principles*, *supra* note no. 68, Preface.

organs they nonetheless indicate the increasing attention paid by international civil society to the issue of victims' right to reparation.

3 VICTIMS' REDRESS UNDER INTERNATIONAL HUMAN RIGHTS LAW: THE RIGHT TO AN EFFECTIVE REMEDY

The scope of redress potentially available to victims who suffered harm at the hands of a state has been substantially expanded by the legal and institutional framework of international human rights law. Generally speaking, reference to the obligation to provide reparation to victims of human rights violations is not always included in the international instruments for the protection of human rights. Rather, an explicit reference to such an obligation is contemplated only in specific cases, such as unlawful arrest or detention and wrongful conviction.⁷¹ However, it is generally agreed that the existence of a general duty to provide – and a corresponding right to obtain – reparation for human rights violations can be derived from a norm that can be found in all general human rights instruments requiring states to provide victims with effective domestic remedies.⁷² As will be discussed further in this section this norm has been generally interpreted as having two elements: on the one hand, the procedural right of access to justice, and on the other hand the right to reparation for the harm suffered as a consequence of the violation.

The emergence of international concern regarding victims' redress dates back to 1948 when the basic right to an effective remedy was included in the Universal Declaration of Human Rights. Article 8 of the Declaration provides that: 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or the law.'⁷³

Although the Universal Declaration is included in a resolution of the UN General Assembly and, as such, is not a binding instrument it has significantly influenced the development of international human rights law. The right to effective remedy itself, as included in more recent human rights instruments, has in fact been formulated in a very similar manner to Article 8 - that is, by delegating the implementation of the right to domestic judicial systems rather than providing *a priori* mechanisms designed to compensate victims.⁷⁴

⁷¹ See e.g., arts 9(5) and 14(6) of the International Covenant on Civil and Political Rights ('ICCPR').

⁷² H. Rombouts, P. Sardaro and S. Vandegiste, 'The Right to Reparation for Victims of Gross and Systematic Violations of Human Rights', in K. de Feyter, S. Parmentier, M. Bossuyt, and P. Lemmens (eds), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Antwerpen: Intersentia & Institute for Human Rights, 2006) 345-503, at 367.

⁷³ UN GA, *Universal Declaration of Human Rights*, GA Res. 217A (III), UN Doc. A/810 at 71 (1948), 10 December 1948.

⁷⁴ On this point, Nowak observed that it is a general principle of law that 'not only the statutory implementation and structuring of international norms of human rights but also the specific protection of the individual against violations of these rights are primarily domestic concerns'. M. Novak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Köhl: N.P. Engel Publisher, 1993), at 57.

As stated above, victims' right to an effective remedy can be found in almost all global and regional human rights treaties⁷⁵ as well as in a number of soft law texts including declarations,⁷⁶ general comments of treaty bodies⁷⁷ and resolutions.⁷⁸ It is interesting to note that most of the provisions relating to remedy limit their scope to affirming the principle and that in only a few cases have the modalities of victims' redress been regulated in detail.⁷⁹ The reason for this is essentially twofold and will be further analysed in the following subsections: first, these instruments allow states to exercise discretion in choosing the types of remedies, and second, the requirements for an effective remedy depend on the type of violation involved.⁸⁰ In this respect the practice of human rights bodies has substantially contributed to the progressive interpretation of the concept of remedy.

⁷⁵ At the universal level: Art. 2(3) of the ICCPR; Art. 11 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Art. 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT'); Art. 6 of the International Convention on the Elimination of All Forms of Racial Discrimination ('CERD'); Art. 39 of the Convention on the Rights of the Child; Art. 20 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions; Arts. 9, 13 and 19 of the International Convention for the Protection of All Persons from Enforced Disappearance. At the regional level: Art. 13 of the European Convention on Human Rights ('ECHR'); Art. 47 of the Charter of Fundamental Rights of the European Union; Art. 25 of the American Convention on Human Rights ('ACHR'); Art. 9 of the Inter-American Convention to Prevent and Punish Torture; Art. 7 of the African Charter on Human and Peoples' Rights (although it does not mention the right to remedy, but rather refers to 'the right to have his cause heard') ('AfrCHPR').

⁷⁶ E.g., Art. 8 of the Universal Declaration of Human Rights; Art. XVIII of the American Declaration of the Rights and Duties of Man; Art. 3 Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation.

⁷⁷ See e.g. Human Rights Committee ('HRC'), *General Comment no. 31, The Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004; Committee on the Economic, Social and Cultural Rights ('CESCR'), *General Comment no. 3, The Nature of States Parties Obligations*, UN Doc. E/1991/23, 14 December 1990; CESCR, *General Comment no. 9, The Domestic Application of the Covenant*, UN Doc. E/C.12/1998/24, 3 December 1998; Committee on the Rights of the Child, *General Comment no. 5: General Measures of Implementation of the Convention on the Rights of the Child*, UN Doc. CRG/GC/2003/5, 3 October 2003; Committee on the Elimination of Discrimination against Women, *General Recommendation No. 19, Violence against Women*, UN Doc. A/47/38, 1992; Committee on the Elimination of All Forms of Racial Discrimination, *General Recommendation No. 26, Article 6 of the Convention*, UN Doc. A/55/18, annex V, 24 March 2000.

⁷⁸ UN GA, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN Doc. A/RES/40/34, 29 November 1985; *Principles on Reparation*, *supra* note no. 48.

⁷⁹ Principle VIII of the *Principles on Reparation* establishes: 'Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law: (a) Equal and effective access to justice; (b) Adequate, effective and prompt reparation for harm suffered; (c) Access to relevant information concerning violations and reparation mechanisms. See also arts. VIII, IX, and X, regulating in detail the three components of the right to remedy.'

⁸⁰ ECtHR, *Aksoy v. Turkey* (App. No. 21987/93), Judgment (Merits and Just Satisfaction), 18 December 1996, at § 95: 'The Court observes that Article 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention.'

3.1 The Development of the Right to an Effective Remedy by Human Rights Supervisory Bodies

A considerable body of jurisprudence has been developed, both at the international and regional level, in relation to the meaning of the right to remedy. This is due to the fact that the exercise of jurisdiction by all human rights supervisory bodies is subject to the rule of exhaustion of local remedies.⁸¹ Accordingly, recourse to international bodies is only possible when the state has failed to afford the required relief.⁸² This rule is based on the rationale that states must be afforded full opportunity to give effect to their international law obligations and hence should have an opportunity to remedy a violation by its own means prior to being called before an international body.⁸³

As such, the practice of human rights bodies has established that the remedy provided to victims should, at a minimum, meet the following requirements. First of all, victims should have a right to access an independent and impartial body, with a view to obtaining recognition of the violation, its cessation (if the violation is continuing) and reparation for the harm suffered.⁸⁴ The European Court of Human Rights, for instance has held that there should be no obstacle in law or in fact to the ability to open proceedings; in general terms, an applicant ‘should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress’.⁸⁵

⁸¹ Art. 2 Optional Protocol to ICCPR, GA Res. 2200A (XXI), UN Doc. A/63/6 (1996), 23 March 1976; Art. 35 ECHR; Art. 56(5) AfrCHPR; Article 46(1)(a) ACHR.

⁸² Nonetheless, where no adequate or effective remedies are available, human rights supervisory bodies have established that there is no obligation to recourse to such remedies and have absolved the applicants from exhausting domestic remedies where special circumstances occur. These special circumstances include: (i) the passivity of national authorities following serious violations of human rights by their agents; (ii) the domestic legislation does not afford adequate or effective remedy; (iii) access to remedies has been denied or prevented; and (iv) an unjustified delay in rendering a final judgment. See e.g. ECtHR, *Akdivar v. Turkey* (App. No. 21893/93), Judgment (Merits and Just Satisfaction), 16 September 1996, §§ 65-69; see D. Shelton, *Remedies in International Human Rights Law*, *supra* note no. 5, at 141.

⁸³ This was already recognised in the early case law of the European Commission on Human Rights (‘EComHR’) in the following terms: ‘The rule requiring the exhaustion of domestic remedies as a condition of the presentation of an international claim is founded upon the principle that the respondent state must first have an opportunity to redress by its own means within the framework of its own domestic legal system the wrong alleged to have been done to the individual’. EComHR, *Austria v. Italy* (App. No. 788/60), Decision, 23 October 1963, at p. 43. On the rule of exhaustion of local remedies, see generally R. Pisillo Mazzeschi, *Esaurimento dei ricorsi interni e diritti umani* (Torino: Giappichelli editore, 2004); C.F. Amerasinghe, *Local Remedies in International Law*, 2nd ed. (Cambridge: Cambridge University Press, 2004), at 64-83.

⁸⁴ See e.g., IACtHR, *Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/87, 6 October 1987, § 24; African Commission on Human and Peoples’ Rights (‘AfrComHPR’), *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 2001, Principle C; AfrComHPR, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria* (Comm. No. 155/96), 27 October 2001, § 61; ECtHR, *Airey v. Ireland* (App. No. 6289/73), Judgment (Merits), 9 October 1979, § 33.

⁸⁵ ECtHR, *Leander v. Sweden* (App. No. 9248/81), Judgment (Merits), 26 March 1987, § 77.

An effective remedy must be accessible to victims. In this respect, the Human Rights Committee has emphasised that this requires that the needs of vulnerable victims are taken into account and that claimants should be able to obtain legal aid.⁸⁶ The Inter-American Court has stressed that the remedy must be simple and expeditious.⁸⁷ The European Court of Human Rights and the African Commission on Human and Peoples' Rights have held that the remedy must be prompt and that the victim must be guaranteed legal representation and legal aid if necessary.⁸⁸

Some international treaties explicitly require states to develop judicial remedies,⁸⁹ that is remedies capable of being enforced by a court of law, but for certain violations (generally speaking, those of a less serious nature) it is also accepted that non-judicial bodies may provide remedies. For example, *General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant* by Article 2 of the ICCPR adopted by the Human Rights Committee states that 'the Committee attaches importance to State Parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law.'⁹⁰

The body examining the complaint must be independent from the authorities allegedly responsible for the violation⁹¹ and must be capable of providing redress.⁹² A necessary corollary is that this also means that the body responsible for redress must be able to enforce its decisions against other authorities.⁹³ The African Commission on Human and Peoples' Rights, for instance, observed that 'any remedy granted shall be enforced by competent authorities', and that 'any state body against which a judicial order or other remedy has been granted shall comply fully with such an order or remedy.'⁹⁴ Similarly, the ECtHR has held that judgments must be enforceable.⁹⁵ Human rights bodies concur that the right to an

⁸⁶ HRC, *Concluding observations on Poland*, UN Doc. CCPR/CO/82/POL, 2 December 2004, § 14.

⁸⁷ IACtHR, *Castillo Páez v. Peru*, Judgment (Merits), 3 November 1997, § 82; *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment (Merits, Reparations, and Costs), 31 August 2001, § 112.

⁸⁸ ECtHR, *Airey v. Ireland*, *supra* note no. 84, § 33; AfrComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, *supra* note no. 84, Principle H. See also Art. 47 of the Charter of Fundamental Rights of the European Union.

⁸⁹ E.g., Art. 25 ACHR.

⁹⁰ *Supra* note no. 77, at § 15.

⁹¹ *Ibid.*; ECtHR, *Keenan v. the United Kingdom* (App. No. 27229/95), Judgment (Merits and Just Satisfaction), 3 April 2001, § 122; IACtHR, *Judicial Guarantees in States of Emergency*, *supra* note no. 84, § 24.

⁹² HRC, *General Comment No. 31*, *supra* note no. 77, § 15; ECtHR, *Silver and Others v. the United Kingdom* (App. Nos. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75), Judgment (Merits), 25 March 1983, § 113; AfrComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, *supra* note no. 84, Principle C(a).

⁹³ IACtHR, *Judicial Guarantees in States of Emergency*, *supra* note no. 84, § 24.

⁹⁴ AfrComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, *supra* note no. 84, Principle C.

⁹⁵ ECtHR, *Hornsby v. Greece* (App. No. 18357/91), Judgment (Merits), 19 March 1997, § 40.

effective remedy is comprised of, besides access to justice and reparation, the right to a prompt, thorough, independent and impartial investigation.⁹⁶

Finally, it is generally agreed that any limitation of this right must pursue a legitimate aim and be proportionate to it;⁹⁷ most importantly, any restriction must not serve to impair the very essence of the right itself.⁹⁸

Despite thorough examination of the procedural requirements of the effective remedy until relatively recently international and regional bodies had not assessed the substantial adequacy of the remedies themselves to any meaningful extent. It was only in the late 1980s when human rights supervisory bodies started receiving a considerable number of cases alleging serious violations of human rights (including torture, arbitrary killings and forced disappearances) that these bodies first considered the nature of the violation as an element directly impinging on the remedies that a state must provide. In such cases human rights bodies have found that gross violations ‘have implications’⁹⁹ for the right to remedy; in particular, that such violations ‘cannot be remedied exclusively through an award of compensation to the relatives of the victim.’¹⁰⁰

As will be illustrated in the following sections of this Chapter, these findings lie at the basis of the emergence of a distinct redress regime for gross human rights violations. Before analysing the main characteristics of this regime, a brief digression on the remedial jurisdiction of human rights supervisory bodies is necessary since it is mostly through this power that international bodies have been able to elaborate on the notion of remedy in cases of gross human rights violations.

⁹⁶ HRC, *General Comment No. 31*, *supra* note no. 77, at § 15; Committee on the Elimination of Racial Discrimination (‘CERD Committee’), *L.K. v. the Netherlands* (Comm. No. 4/1991), UN Doc. CERD/C/42/D/4/1991, 16 March 1993, § 6.9; CERD Committee, *Ziad Ben Ahmed Habassi v. Denmark* (Comm. No. 10/1997), UN Doc. CERD/C/54/D/10/1997, 6 April 1999, §§ 9.3-10; IACtHR, *Blake v. Guatemala*, Judgment (Merits), 24 January 1998, § 97; *Villagrán Morales et al v. Guatemala*, Judgment (Merits), 19 November 1999, § 225; *Castillo Páez v. Peru*, *supra* note no. 87, § 90; IACHR, Case 10.247 et al., *Extrajudicial Executions and Forced Disappearances of Persons* (Peru), 11 October 2001, § 243; see also Case 11.654, *Riofrío Massacre (Colombia)*, 6 April 2001, § 74; ECtHR: *Aksoy v. Turkey*, *supra* note no. 80, §§ 95-100. This right is discussed with reference to criminal justice in Chapter III.

⁹⁷ ECtHR, *Fayed v. United Kingdom* (App. No. 17101/90), Judgment (Merits and Just Satisfaction), 21 September 1990, § 65; *Bellet v. France* (App. No. 23805/94), Judgment (Merits and Just Satisfaction), 4 December 1995, § 31.

⁹⁸ ECtHR, *Ashingdane v. United Kingdom* (App. No. 8225/78), Judgment (Merits), 28 May 1985, § 57; HRC, *General Comment No. 29 on Derogations during a State of Emergency*, 31 August 2001, UN Doc. CCPR/C/21/Rev.1/Add.11, § 14.

⁹⁹ ECtHR, *Aksoy v. Turkey*, *supra* note no. 80, § 98.

¹⁰⁰ ECtHR, *Nikolova and Velichkova v. Bulgaria* (App. No. 7888/03), Judgment (Merits and Just Satisfaction), 20 December 2007, at § 55. See also IACtHR, *Durand and Ugarte v. Peru*, Judgment (Merits), 16 August 2000, § 130.

3.2 The Remedial Powers of International Human Rights Supervisory Bodies

Under almost all international instruments protecting human rights states are responsible for providing victims of human rights violations with adequate remedies. However, in practice not all states may be willing or able to offer to victims a remedy for the violations suffered. In order to avoid that harm suffered by victims remains ‘unremedied’ a number of human rights bodies offer a ‘safety net’¹⁰¹ for victims through the exercise of their power to award, or at the very least recommend, reparations for victims (referred to as their ‘remedial jurisdiction’).

Despite its subsidiary nature the remedial jurisdiction of international bodies is extremely important to the protection of human rights, especially in cases of gross human rights violations as will be discussed subsequently in this Chapter. It should be noted that most human rights treaties do not make explicit reference to the competence of a supervisory body to afford remedies for human rights violations, but a number of human rights institutions which hear individual complaints have nevertheless regularly expressed their views on remedies as part of their compliance monitoring powers. In this respect, Shelton has referred to the remedial powers of international bodies as ‘implied powers’ which may be inferred from the fundamental character of the duty to provide reparation as an automatic consequence arising from an international wrongful act.¹⁰² The practice of four human rights supervisory bodies can be examined in this regard: the Human Rights Committee, being the only quasi-judicial body of universal character with a general human rights competence, and of the three human rights regional systems (European, Inter-American and African).

3.2.1 The Remedial Jurisdiction of the Human Rights Committee

The Human Rights Committee is a body of independent experts which monitors the implementation of the ICCPR by states parties. Among other functions¹⁰³ the Committee may consider individual petitions submitted against states party to the first Optional Protocol.¹⁰⁴ Upon finding that a state party has violated the Covenant the Committee transmits its ‘views’

¹⁰¹ I. Bottiglieri, *Redress for Victims of Crimes*, *supra* note no. 5, at 152.

¹⁰² In the *LaGrand* case, the ICJ held: ‘Where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation’. ICJ, *LaGrand Case* (Germany v. United States of America), *ICJ Reports* 2001, p. 466, 27 June 2001, § 48.

¹⁰³ In addition to the competence to examine individual complaints, the Committee analyses the annual reports submitted by the states parties to the Covenant and issues recommendations in the form of ‘concluding observations’. Furthermore, Art. 41 of the ICCPR provides for the Committee to consider inter-state complaints. The Committee also publishes its interpretation of the content of human rights provisions, known as general comments on thematic issues or its methods of work.

¹⁰⁴ Art. 1 Optional Protocol ICCPR.

to the state pursuant to Article 5(4) of the Protocol. Since the HRC is not a judicial body its final views under Article 5(4) of the Optional Protocol are not strictly binding on a state. However, the HRC is the authoritative interpreter of the ICCPR, which is binding on states and as such it goes without saying that non-compliance with Committee views can be seen as evidence of bad faith with regard to state obligations under the Covenant.¹⁰⁵ Furthermore, the fact that the Protocol does not explicitly mention the jurisdiction of the Committee to rule on remedies has not prevented it from determining the consequences entailed by the violation set out in its views.¹⁰⁶ Since the first views adopted in 1979 the Committee has consistently stressed that the finding of a violation entails an obligation on the state to provide redress to the victim which derives from Article 2(3) of the Covenant.¹⁰⁷

In 2004, the Human Rights Committee clarified the scope and content of the right to remedy in its *General Comment No. 31*. In the *General Comment*, the Committee explicitly links the concepts of remedy and reparation, affirming that:

Article 2, paragraph 3 requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.¹⁰⁸

Despite the fact that the Committee initially adopted a narrow interpretation of Article 2(3), a review of more recent practice in relation to individual petitions shows that the Committee's attitude to remedies has developed in line with the position set out in General Comment no. 31. In recent years the Committee's views have become more specific about the appropriate remedy in each case brought to its attention.

¹⁰⁵ S. Josef, J. Schultz and M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 2nd ed. (Oxford: Oxford University Press, 2004), at 24.

¹⁰⁶ On the remedial competence of the HRC, see E. Klein, 'Individual Reparation Claims under the International Covenant on Civil and Political Rights: The Practice of the Human Rights Committee', in A. Randelzhofer and C. Tomuschat (eds), *State Responsibility and the Individual: Reparations in Instances of Grave Violations of Human Rights*, *supra* note no. 8, 27-42; H. J. Steiner, 'Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?', in P. Alston and J. Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press, 2000) 15-53.

¹⁰⁷ HRC, *Edgardo Dante Santullo Valcada v. Uruguay* (Comm. No. 9/1977), UN Doc. CCPR/C/8/D/9/1977, 26 October 1979.

¹⁰⁸ HRC, *General Comment no. 31*, *supra* note no. 77, § 16.

Whilst the Committee lacks a mandate to order monetary compensation, since 2000 it has indicated the exact amount which is due to the victims. To illustrate, whereas in *Rodríguez v. Uruguay*, a case of torture and arbitrary detention during the military dictatorship, the Committee had limited itself to recommending that compensation be paid to the victim and his next of kin,¹⁰⁹ in *Laptsevich v. Belarus*, a case concerning the violation of the freedom of expression and opinion, the Committee recommended the state to pay compensation to the victim ‘amounting to a sum not less than the present value of the fine and any legal costs paid’.¹¹⁰

The Committee has also recommended reparation in the forms of restitution, including restitution of liberty in cases of unduly prolonged detentions without trial¹¹¹ or restitution of property in cases where property was wrongfully reassigned.¹¹² In certain cases the Committee has also recommended amending a law found to be in violation of individual rights such as the right to equality before the law and to be free from discrimination,¹¹³ and the obligation on the state to ensure non-repetition of the violation.¹¹⁴

As will be explored later in this Chapter, it is in cases of gross human rights violations that the Human Rights Committee has considerably expanded its remedial powers by elaborating specific remedies which go beyond the traditional categories of reparation, such as restitution and compensation. Whilst the Committee has generally found that human rights violations can be remedied through both judicial and administrative measures,¹¹⁵ as acknowledged in the *General Comment No. 31*, the Committee has progressively moved away from this view in cases of serious violations.

In such cases the Committee has stated that the right to an effective remedy entails that allegations of human rights violations be investigated promptly and impartially by competent

¹⁰⁹ HRC, *Hugo Rodríguez v. Uruguay*, Comm. (No. 322/188), UN Doc. CCPR/C/51/D/322/1988, 19 July 1994, § 14.

¹¹⁰ HRC, *Vladimir Petrovich Laptsevich v. Belarus* (Comm. No. 790/1997), UN Doc. CCPR/C/68/D/780/1997 (2000), 13 April 2000; see also *Müller and Engelhard v. Namibia* (Comm. No. 919/2000), UN Doc. CCPR/C/74/D/919/2000, 26 March 2002.

¹¹¹ *Cagas et al. v. The Philippines* (Comm. No. 788/1997), UN Doc. CCPR/C/73/D/788/1997, 23 October 2001 (after more than 9 years in detention without trial, the Committee urged the state either to promptly try the recurrent or to release him).

¹¹² *Brok v. Czech Republic* (Comm. No. 774/1997), UN Doc. CCPR/C/73/D/774/1997, 31 October 2001 (restitution was required for discrimination in property restitution)

¹¹³ *Karakurt v. Austria* (Comm. No. 965/2000), UN Doc. CCPR/C/74/D/965/2000, 4 April 2002.

¹¹⁴ For example, the Committee found that Colombia had not prevented the disappearance and the death of the parents of the complainant and held that the state had the duty to take measures to ensure that similar violations did not occur in the future, see *Joaquín David Herrera Rubio et al. v. Colombia* (Comm. No. 161/1983), UN Doc. CCPR/C/OP/2 at 192 (1990), 2 November 1987, at § 12. See also *Frances et al. v. Trinidad and Tobago* (Comm. No. 899/1999), UN Doc. CCPR/C/75/D/899/1999 (2002), 25 July 2002, § 7.

¹¹⁵ *General Comment No. 31*, *supra* note no. 77, § 15.

authorities.¹¹⁶ Similarly, the Committee held in the case of *Bautista v. Colombia*, concerning the disappearance, torture and killing of a member of a left-wing group, that disciplinary measures against the military officials responsible for the violations were an insufficient remedy. From that case onwards the Committee insisted that in cases of gross human rights violations the state party should open criminal proceedings against those responsible ‘because purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of Article 2, paragraph 3 of the Covenant’.¹¹⁷

In cases of disappearance, such as in *Jegatheeswara v. Sri Lanka*, a case concerning the disappearance of an alleged Tamil Tiger sympathiser, the Committee added a further element of reparation: the right to receive ‘adequate information’ on the results of the investigation of the violations.¹¹⁸ In a similar vein, in the case of *Sankara v. Burkina Faso*, the Committee recommended the state to inform the relatives of the victim about the burial place of Mr Sankara.¹¹⁹

It has been observed that, despite the broadening scope of the Committee’s remedial jurisdiction, it maintains a rather narrow approach to the forms of reparation that are eventually recommended.¹²⁰ In particular, in cases of torture, the Committee has only recommended that victims be provided with medical assistance and rehabilitation in a few cases.¹²¹ The absence of certain forms of reparation from the Committee’s case law has been attributed to the lack of consultations with the victims about remedies.¹²² At the time of writing the possibility of developing more precise remedies is being considered by the Committee although no consensus has yet been reached.¹²³

¹¹⁶ HRC, *Rodríguez v. Uruguay*, *supra* note no. 109, § 14; *Blanco v. Nicaragua* (Comm. No. 328/188), UN Doc. CCPR/C/51/D/328/1988, 18 August 1994, § 12.

¹¹⁷ HRC, *Bautista de Arellana v. Colombia* (Comm. No. 563/1993), UN Doc. CCPR/C/55/D/563/1993, 27 October 1995, § 8.2.

¹¹⁸ HRC, *Jegatheeswara Sarma v. Sri Lanka* (Comm. No. 950/2000), UN Doc. CCPR/C/78/D/950/2000 (2003), 16 July 2003, § 11; see also *El Hassy v. Libyan Arab Jamahiriya* (Comm. No. 1422/2005), UN Doc. CCPR/C/91/D/1422/2005, 24 October 2007, § 8, and *Sharma v. Nepal* (Comm. No. 1469/2006), UN Doc. CCPR/C/94/D/1469/2006, 28 October 2008, § 9.

¹¹⁹ HRC, *Sankara et al. v. Burkina Faso* (Comm. No. 1159/2003), UN Doc. CCPR/C/86/D/1159/2003, 9 March 2004, § 14.

¹²⁰ C. Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge: Cambridge University Press, 2012), at 49-50.

¹²¹ HRC, *Setelich v. Uruguay* (Comm. No. 63/1979), UN Doc. CCPR/C/14/63/1979, 28 October 1981, § 21.

¹²² C. Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, *supra* note no. 120, at 50.

¹²³ UN International Human Rights Instruments, *Report of the Inter-Committee Meeting Working Group on Follow-up to Concluding Observations, Decisions on Individual Complaints and Inquiries*, UN Doc. HRI/ICM/2011/3-HRI/MC/2011/2, 4 May 2011, § 51.

3.2.2 *The Remedial Jurisdiction of the European Court of Human Rights*

The European Court of Human Rights is the first human rights supervisory body with the power to deliver legally binding judgments on remedies. With the entry into force of Protocol 11 in 1998, individuals who have exhausted domestic remedies have the right to submit a complaint directly to the Court and states ‘undertake not to hinder in any way the effective exercise of this right’.¹²⁴ Upon finding a violation, pursuant to Article 41 of the Convention the Court ‘shall, if necessary, afford just satisfaction to the injured party.’

Despite being widely recognised as the most advanced system of human rights adjudication with respect to individual standing,¹²⁵ the ECtHR has long interpreted its remedial powers pursuant to Article 41 of the ECHR in a rather cautious manner. In particular, for decades the Court took the position that it lacked authority to issue explicit directions on remedial matters, that the award of just satisfaction is optional and that a judgment may in itself afford satisfaction for victims.¹²⁶ This position has been much criticised both by legal scholars¹²⁷ and by certain ECtHR judges. For instance, Judge Bonello noted in a dissenting opinion that ‘it [is] wholly inadequate and unacceptable that a court of justice should “satisfy” the victim of a breach of fundamental rights with a mere handout of legal idiom’.¹²⁸

This restrictive approach to remedial powers has been partly explained by the fact that redress of individual wrongs was not seen as the primary objective of the European system, at least at the beginning of its activities.¹²⁹ As is well known the Convention regime was created with the intention of ‘providing a collective, inter-state guarantee’,¹³⁰ that would benefit individuals only as a second objective. Accordingly, individual petitions were conceived as a mechanism for bringing to light an international wrongful act and not as a means for seeking

¹²⁴ Art. 34 ECHR, as amended after Protocol 11 entered into force in 1998.

¹²⁵ A. Moravcsik, ‘The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe’, 54 *International Organization* (2000) 217-252, at 217.

¹²⁶ For example, in *Mehemi v. France*, the Court held that the finding of a violation in the judgment constituted itself just satisfaction and that it did not have the jurisdiction to order the state to permit the applicant to return to France and issue him a residence permit. ECtHR, *Mehemi v. France* (App. No. 25017/94), Judgment (Merits and Just Satisfaction), 26 September 1967, §§ 41 and 43.

¹²⁷ R. Higgins, ‘Damages for Violation of One’s Human Rights’, in N.A. Sims (ed), *Explorations in Ethics and International Relations*, cited in D. Shelton, *Remedies in International Human Rights Law*, *supra* note no. 5, at 195.

¹²⁸ Dissenting Opinion of Judge Bonello, in *Nikolova v. Bulgaria* (App. No. 31195/96), Judgment (Merits and Just Satisfaction), 25 March 1999.

¹²⁹ D. Shelton, *Remedies in International Human Rights Law*, *supra* note no. 5, at 200.

¹³⁰ D.J. Harris, M. O’Boyle and C. Warbrick, *Law of the European Convention on Human Rights*, 2nd ed. (Oxford: Oxford University Press, 2009), at 33.

a remedy for individual victims.¹³¹ Moreover, in contrast to other regional human rights systems the European Court did not, at least in the initial phase of its activities, receive many applications concerning serious violations of human rights.

Nevertheless, in the last two decades significant changes have occurred in relation to the interpretation of the remedial powers of the Court pursuant to Article 41. These changes have been influenced by the reform of the Court in 1998, giving individuals direct access to it, the expansion of the number of state parties and the corresponding increasing number of cases filed (in particular concerning serious violations of human rights with many occurring during armed conflicts). In short, the Court has progressively moved away from its traditional resistance to awarding compensation and the idea that the judgment constitutes satisfaction in itself.

The Court now regularly awards compensation for both pecuniary and non-pecuniary damages as well as for legal costs. In 1998, in response to a request of the Committee of Ministers calling on the Court to identify cases of systematic violations of human rights and the necessary remedial measures¹³² the Court began to give more guidance on the measures necessary to remedy violations. In certain cases the Court has indicated non-monetary relief for applicants. Prior to the reform of the Court non-monetary remedies such as restitution were limited to property cases.¹³³ More recently the Court has extended its indication of restitution to violations of other rights, such as deprivation of liberty.¹³⁴

However, to date the Court has not awarded other types of non-monetary remedies for victims of violations such as the annulment of national measures violating conventional rights or the initiation of investigations into the violations. This approach proves inadequate especially in cases of gross human rights violations. For instance, in cases of torture, the Court has never ordered reparation in the form of rehabilitation. A modest step forward has been introduced by the Court in 2010 in the case of *Danev v. Bulgaria* in which the Court stressed that the negative effects of unlawful detention on an individual's psychological condition may remain after release and criticised the state for not having provided rehabilitation.¹³⁵

¹³¹ *Ibid.*

¹³² Council of Europe, Committee of Ministers, *Resolution Res(2004)3*, 12 May 2004.

¹³³ ECtHR, *Papamichalopoulos and Others v. Greece* (App. No. 14556/89), Judgment (Just Satisfaction), 31 October 1995, § 34. However, the Court also recognised that should the violation call for restitution, 'it is for the respondent State to effect it, the Court having neither the power nor the practical possibility of doing so itself.'

¹³⁴ ECtHR, *Assanidze v. Georgia* (App. No. 71503/01), Judgment (Merits and Just Satisfaction), 8 April 2004. See also *Broniowski v. Poland* (App. No. 31443/96), Judgment (Merits), 22 June 2004.

¹³⁵ ECtHR, *Danev v. Bulgaria* (App. No. 9411/05), Judgment (Merits and Just Satisfaction), 2 September 2010, § 34.

The fact that victims of human rights violations enjoy easier access to the Court following the adoption of Protocol 11 in 1998 ought to prompt the Court to reconsider its unwillingness to order measures other than compensation even though the nature of the remedial jurisdiction of the Court remains subsidiary.¹³⁶ Arguably, the adoption of a broader interpretation of the Court's remedial powers pursuant to Article 41 would greatly improve the protection of human rights within the European system, particularly in those cases involving serious violations of human rights. Indeed, in such cases, the Court itself has recognised, as will be discussed later in this Chapter, that compensation alone is not an adequate form of redress. A broad remedial jurisdiction would help ensure that adequate forms remedies are ultimately granted by the responsible state. Moving towards more specific orders of redress would also bring the European Court in line with the practice of universal bodies, such as the Human Rights Committee seen above, and of other regional human rights supervisory bodies.

3.2.3 The Remedial Jurisdiction of the Inter-American Court of Human Rights

The most significant example on the proactive development of the question of victim's redress by human rights supervisory bodies is the Inter-American Court of Human Rights which is explicitly vested with broad remedial powers. Pursuant to Article 63(1) of the ACHR, when a violation is found the Court:

[S]hall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

Compared to Article 41 of the ECHR, which only refers to just satisfaction, Article 63 of the ACHR is more explicit and contains reference to remedies as separate from compensation. This language indicates that the Court's remedial powers are not limited to compensation, which is therefore only one of the measures that can be ordered.

A review of the Court's case law reveals how this body has made broad use of its remedial jurisdiction, awarding both monetary and non-monetary remedies. In particular, the

¹³⁶ ECtHR, *Z. and Others v. United Kingdom* (App. No. 29392/95), Judgment (Merits and Just Satisfaction), 10 May 2001, at §103: 'It is fundamental to the machinery of protection established by the Convention that the national systems themselves provide redress for breaches of its provisions, the Court exerting its supervisory role subject to the principle of subsidiarity'.

Court has paid significant attention to awarding specific reparation measures according to the international obligation violated. This was clearly expressed in the *La Cantuta* case:

Reparations are measures aimed at removing the effects of the violation and the damage inflicted at both the pecuniary and non-pecuniary level. These measures may neither enrich nor impoverish the victim or the victim's beneficiaries, and they must bear proportion to the breaches declared as such in the judgment.¹³⁷

The rationale behind adopting a broad interpretation of its remedial jurisdiction stems from the nature of the violations that tend to occur in the region. Indeed, individuals of states parties to the Inter-American Court have often been afflicted by serious violations of human rights including torture, disappearances, and extrajudicial executions. Several cases brought before the Court have dealt with massacres.¹³⁸ In such cases, restitution has often been unrealisable. Moreover, relatives of the victims or survivors have generally preferred, besides compensation for material and non-material damage, non-monetary forms of reparation to compensation with a view to restoring the dignity of the victims, knowing the truth, and ensuring the accountability of those responsible for the violations.¹³⁹

Since its inception, the Court has adopted a creative approach to reparation and interpreted the concept in a broad manner. In particular, it has often specified concrete reparation measures stressing aspects of satisfaction and guarantees of non-repetition. For instance, in the *Aloeboetoe et al. v. Suriname*, a case concerning the killing by the army of members of a Maroon tribe, in addition to monetary compensation the Court also awarded measures of collective reparation such as the setting up of a school and a medical centre¹⁴⁰

In the *Loayza Tamayo v. Peru* case, concerning the unlawful detention and torture of a university professor, the Court awarded a broad array of reparations apart from monetary compensation including restitution by reinstating the victim in her teaching position, medical rehabilitation, public apologies in the newspapers and the amendment of anti-terrorist legislation in conformity with the Convention.¹⁴¹

¹³⁷ IACtHR, *La Cantuta v. Peru*, Judgment (Merits, Reparations, and Costs), 29 November 2006, § 202.

¹³⁸ E.g., IACtHR, *Plan de Sánchez Massacre v. Guatemala*, Judgment (Merits), 29 April 2004; *Mapiripán Massacre v. Colombia*, Judgment (Merits, Reparations, and Costs), 15 September 2005; *Pueblo Bello Massacre v. Colombia*, Judgment (Merits, Reparations, and Costs), 31 January 2006; *Ituango Massacres v. Colombia*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 1 July 2006.

¹³⁹ See the pleadings of victims' representatives in the cases *supra* note no. 138. For instance, in the *Mapiripán Massacre* case, the victims' representatives asked for a series of measures of satisfaction, including: a public act of acknowledgment of responsibility, a commemoration of the victim, community support measures, guarantees of non-repetition, the criminal accountability of perpetrators and the finding and identification of the missing victims (§ 292).

¹⁴⁰ IACtHR, *Aloeboetoe et al. v. Suriname*, Judgment (Reparations and Costs), 10 September 1993, § 96.

¹⁴¹ IACtHR, *Loayza Tamayo v. Peru*, Judgment (Reparations and Costs), 27 November 1998, §§ 113-164.

In more recent cases, the Court has dealt with the challenge of issuing reparation in cases of massacres involving a large number of victims. In the case *Massacre Plan de Sánchez v. Guatemala*, concerning the execution of about 280 members of a Mayan indigenous community, the Court set an important precedent according to which communities may be recognised as beneficiaries of collective reparations. In addition to monetary compensation the Court ordered a series of symbolic measures aimed at providing fair reparation to victims of the massacre, including restitution, by ensuring survivors a decent standard of living as well as the investigation, prosecution and punishment of those responsible for the violations, a public acceptance of responsibility for the violations, the establishment of a housing programme, medical and psychological treatment for all surviving victims and the implementation of cultural and educational programs.¹⁴² Similarly, in another case concerning a massacre, *Mapiripán Massacre v. Colombia*, the Court ordered the state party to provide victims with reparation, in addition to financial compensation, including the proper identification of the victims, medical and psychological assistance to the families of the victims, a public apology and a remembrance monument as well as human rights training for the members of the army.¹⁴³

All in all, the Inter-American Court has provided an important contribution to the development of the concept of remedy, particularly in cases of large-scale violations, taking into account the nature of the violations, the socio-economic and cultural background of the victimised communities as well as the peculiar vulnerabilities of minorities and indigenous peoples.¹⁴⁴ In so doing the IACtHR case law has paved the way for the emergence of a comprehensive notion of reparation which has only recently been recognised at the universal level.

3.2.4 The Remedial Jurisdiction of the African Court on Human and Peoples' Rights and the African Commission on Human and Peoples' Rights

The African human rights system is the most recently established of the regional mechanisms, the African Court on Human and Peoples' Rights only becoming operational in 2009.

¹⁴² IACtHR, *Plan de Sánchez v. Colombia*, *supra* note no. 138, §§ 93-111.

¹⁴³ IACtHR, *Mapiripán Massacre v. Colombia*, *supra* note no. 138, §§ 295-318.

¹⁴⁴ For a detailed review of the remedial mandate of the Inter-American Court, see T.M. Antkowiak, 'Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond' 46 *Columbia Journal of Transnational Law* (2007) 351-419; J.M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, 2nd ed. (Cambridge: Cambridge University Press, 2013), at 188-250.

Although at present no relevant case law has been delivered, the African Court on Human and Peoples' Rights is also likely to make an important contribution to the development of the practice of human rights supervisory bodies' remedial powers. This is so since the Court is explicitly vested with broad powers to award victims' redress in various forms similar to those of the Inter-American Court.¹⁴⁵ Article 27(1) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights establishes that '[i]f the Court finds that there has been a violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.' The broad wording of this provision allows the Court considerable discretion when choosing an appropriate remedy. While the formulation of Article 27 is similar to Article 63(1) of the ACHR it has been observed that the African Court's remedial jurisdiction is probably 'broader than all the current mandates to afford remedies to victims of human rights abuses.'¹⁴⁶

In this respect, the Court is likely to follow the practice of the African Commission on Human and Peoples' Rights, with which it shares the mandate of promoting and ensuring protection of human rights in Africa, and that of monitoring state compliance with the provisions of the African Charter on Human and Peoples' Rights. Due to its relatively recent institution the African Commission is still in the process of defining the scope of its powers; nonetheless, by the end of its first decade of activities it has recognised that the main aim of the communications procedure is 'to initiate a positive dialogue, resulting in an amicable resolution ... which *remedies* the prejudice complained of.'¹⁴⁷ It has therefore been observed that, in so doing, the Commission 'recognizes that the ultimate objective of communications is 'the redress of the violations complained of'.¹⁴⁸

However, the Commission has attracted much criticism, especially for its initial hesitance in exercising and developing its powers.¹⁴⁹ The main criticism which has been raised relates to the inability of the Commission to award the injured parties adequate

¹⁴⁵ F. Viljoen, *International Human Rights Law in Africa* (Oxford: Oxford University Press, 2007), at 453.

¹⁴⁶ D. Shelton, *Remedies in International Human Rights Law*, *supra* note no. 5, at 226.

¹⁴⁷ See AfrComHPR, *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v. DRC* (Comm. Nos. 25/89, 47/90, 59/91 and 100/93), 4 April 1996, § 39 (emphasis added).

¹⁴⁸ C. A. Odinkalu, 'The Individual Complaints Procedures of the African Commission on Human and Peoples' Rights: A Preliminary Assessment', 8 *Transnational Law and Contemporary Problems* (1998) 359-405, at 374.

¹⁴⁹ G.J. Naldi, 'Reparations in the Practice of the African Commission on Human and Peoples' Rights', 14 *Leiden Journal of International Law* (2011) 681-693.

remedies. In its early stages, the Commission was mostly silent on the issue of reparations.¹⁵⁰ This might have been the case because neither the African Charter nor the Rules of Procedure provide for victims' right to remedy.¹⁵¹ This might also be explained by the parties not having had the opportunity, in an initial phase, to present arguments on the matter.¹⁵² In cases where the Commission found 'serious or massive violations' the absence of a remedy in most cases was justified in light of the Assembly's anticipated 'request to undertake an in-depth study' on such violations.¹⁵³ Essentially, the initial thinking was that a remedial order in individual communications lay outside the mandate of the Commission and had to be addressed at the political level by the Assembly.¹⁵⁴ More often the Commission's role has been limited to negotiating so-called 'friendly settlements'¹⁵⁵ between the state and the complainants.

Subsequently the Commission has gradually moved away from this practice as it started recommending that states take 'necessary measures' to comply with the Charter (although without specifying what exactly these measures were)¹⁵⁶ Specifically, the Commission has recently started adopting more targeted remedial orders, although not always in a consistent manner.¹⁵⁷ Two approaches have emerged so far with respect to the scope of the Commission's remedial powers.

The first approach consists of issuing an 'open-ended' remedy where, for example, the Commission urges the state 'to bring its laws in conformity with the provisions of the African Charter',¹⁵⁸ or 'in conformity with' its decision.¹⁵⁹ The second approach consists of issuing recommendations for specific conduct as targeted remedies; these include (i) executive

¹⁵⁰ AfrComHPR, *Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa), Amnesty International (on behalf of Orton and Vera Chirwa) v. Malawi* (Comm. Nos. 64/92, 68/92, 78/92), 22 March 1995.

¹⁵¹ Art. 7 of the AfrCHPR refers to the 'right to be heard', while the right to remedy as such is not explicitly contemplated in the Charter.

¹⁵² F. Viljoen, 'Communications under the African Charter: Procedure and Admissibility', in M. Evans and R. Murray, *The African Charter on Human and Peoples' Rights: The System in Practice*, 2nd ed. (Cambridge: Cambridge University Press, 2008) 76-138, at 79. See e.g. AfrComHPR, *Amnesty International v. Malawi*, *supra* note no. 150; *Huri-Laws v. Nigeria* (Comm. No. 225/98), 6 November 2000; *Forum of Coscience v. Sierra Leone* (Comm. No. 223/98), 6 November 2000.

¹⁵³ See art. 58(2) of the AfrCHPR; see AfrComHPR, *Commission nationale des droits de l'Homme et des libertés v. Chad* (Comm. No. 74/92), 11 October 1995.

¹⁵⁴ F. Viljoen, *International Human Rights Law in Africa*, *supra* note no. 145, at 355-356.

¹⁵⁵ Rule 90 of the AfrComHPR Rules of Procedure.

¹⁵⁶ AfrComHPR, *Organisation mondiale contre la torture, Association Internationale des juristes démocrates, Commission internationale des juristes, Union interafricaine des droits de l'Homme v. Rwanda* (Comm. Nos. 27/89, 46/91, 49/91 and 99/93), 31 October 1996.

¹⁵⁷ AfrComHPR, *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria* (Comm. Nos. 143/95, 150/96), 5 November 1999; *Social and Economic Rights Action v. Nigeria*, *supra* note no. 84.

¹⁵⁸ AfrComHPR, *Media Rights Agenda v. Nigeria* (Comm. No. 224/98), 6 November 2000.

¹⁵⁹ AfrComHPR, *Organisation mondiale contre la torture v. Rwanda*, *supra* note no. 156.

conduct, such as the release of detainees,¹⁶⁰ (ii) legislative measures,¹⁶¹ or (iii) compensation be paid to victims.¹⁶² A clear example of the latter approach is the *Mauritania* cases concerning serious violations of human rights (extra-judicial executions, torture, disappearances and slavery).¹⁶³ In these cases the Commission has recommended a detailed list of reparation measures including the establishment of an inquiry to investigate the fate of disappeared persons, the identification and prosecution of the perpetrators, the replacement of identity cards and reparation to people forcibly expelled, the payment of compensation to widows and other beneficiaries of the victims, the development of a strategy to eradicate the causes of violence and to enforce the abolition of slavery.¹⁶⁴

Therefore, despite initially taking a conservative approach to the issue of reparation, the African Commission when faced with cases of serious violations of human rights has adopted a creative approach recommending policy-oriented and collective measures of reparation. However, it has been reported that, compared to the other regional and universal human rights systems, challenges remain with regard to the implementation of the reparation measures recommended.¹⁶⁵ It remains to be seen, therefore, whether and, if so, how the relationship between the Commission and the Court will influence the access of individuals and groups of individuals to fair and effective reparation for the violations suffered.

¹⁶⁰ AfrComHPR, *Constitutional Rights Project v. Nigeria*, *supra* note no. 157.

¹⁶¹ AfrComHPR, *Lawyers of Human Rights v. Swaziland* (Comm. No. 251/02), 2 July 2005.

¹⁶² AfrComHPR, *Muthuthurin Njoka v. Kenya* (Comm. No. 142/94), 22 March 1995.

¹⁶³ AfrComHPR, *Malawi African Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme v. Mauritania* (Comm. Nos. 54/91-61/91-96/93-98/93-164/97-196/97-210/98), 11 May 2000.

¹⁶⁴ *Ibid.*, last paragraph.

¹⁶⁵ C. Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, *supra* note no. 120, at 80.

4 REPARATION FOR GROSS VIOLATIONS OF HUMAN RIGHTS: A DISTINCT REDRESS REGIME

As discussed in the previous sections the existence of a state's duty to provide a remedy to victims of violations of human rights is now well grounded in several international and regional conventions. In this regard, monetary compensation has long been viewed as the principal remedy for victims of human rights abuses.¹⁶⁶ However, this Chapter argues that an emerging legal principle demands that victims of gross violations of human rights have a right to a distinct redress regime since traditional forms of reparation are inadequate to repair the injuries suffered by the victims of this type of violation.

In order to justify this claim it is necessary to understand the theoretical and legal basis for a distinct redress regime. While a thorough analysis of what victims think and want in the aftermath of gross violations of human rights falls outside the scope of this thesis, the following section will first identify some common features of this type of violation as well as its effect on society and on victims' needs and expectations. Secondly, the legal framework characterising this distinct redress regime, focusing on international instruments dealing with gross violations of human rights as well as on the practice of human rights supervisory bodies will be examined.

4.1 The Need for a Distinct Redress Regime

4.1.1 *Why Traditional Forms of Reparation Are Inadequate in Cases of Gross Human Rights Violations*

When assessing what form of reparation should be awarded in the context of gross human rights violations, reference to criteria used for individual violations of human rights may raise some problems. As we have seen, courts mainly resort to '*restitutio in integrum*' and to material compensation as preferred remedies in individual cases. *Restitutio in integrum* has the aim of re-establishing, as far as possible, the situation that existed prior to the violation.¹⁶⁷ When restoration of the situation prior to the violation is not possible, this fundamental

¹⁶⁶ H. Rombouts, P. Sardaro and S. Vandegiste, 'The Right to Reparation for Victims of Gross and Systematic Violations of Human Rights', *supra* note no. 72, at 378-395.

¹⁶⁷ Factory at Chorzów, Merits, *supra* note no. 12, § 47.

principle influences the mechanism of compensation,¹⁶⁸ which will be measured in relation to the condition of the victim before the harm took place.¹⁶⁹

In cases of gross human rights violations, some problems may arise when considering these principles. Arguably, gross and systematic violations and individual cases differ both qualitatively and quantitatively and this may affect the scope and nature of remedies that should be afforded to victims. Three problems, in particular, can be pointed out.

First, gross and systematic human rights violations may cause injuries that, due to their gravity, cannot be repaired by means of restitution or compensation. The loss of a family member and the moral damage linked to it, for instance, can never be entirely reparable. Second, gross and systematic violations often occur in the context of armed conflicts where the high number of victims and perpetrators may prevent any attempt to provide individual redress. Moreover, the overall social context in which the remedies for gross and systematic violations must be afforded differs from the individual case. Where there have been widespread human rights abuses, or serious violations of human rights, the entire society often has suffered together with the direct victims. Although it is unlikely that healing can occur without redress of individual victims wrongs, remedies may also have to be adjusted to achieve other goals including deterrence of individual wrongdoing, rehabilitation of society and reconciliation of individuals and groups.¹⁷⁰

Third, in the context of gross human rights violations, it has been argued that *restitutio in integrum* is not possible, because a return to the *status quo ante* is not only unrealisable but also undesirable because the victims may have never been in a normal or ideal position. A classical example related to this argument is the South African case, where people were born under the oppressive regime of apartheid never enjoying a preferable *status quo ante*.¹⁷¹ Restoring the situation prior to the violation is thus not a valid option and inventing the hypothetical pre-violation situation would be an arduous, and perhaps futile, task.

In light of the above it is apparent that in cases of gross human rights violations, standards of reparation may not be determined by referring to the traditional categories of reparation. Rather, a reasoned understanding of reparation which takes into account specific

¹⁶⁸ The subsidiary nature of compensation is made clear by Article 36 of the ILC Draft Articles, which reads: 'The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.'

¹⁶⁹ H. Rombouts, P. Sardaro and S. Vandegiste, 'The Right to Reparation for Victims of Gross and Systematic Violations of Human Rights', *supra* note no. 72, at 457.

¹⁷⁰ P. De Grieff, 'Justice and Reparation', in *Idem* (ed.), *The Handbook of Reparations* (Oxford: Oxford University Press, 2006) 451-477, at 454 ff.

¹⁷¹ H. Rombouts, P. Sardaro and S. Vandegiste, 'The Right to Reparation for Victims of Gross and Systematic Violations of Human Rights', *supra* note no. 72, at 457.

violations, the gravity of harm suffered by the victims, the high number of victims and the overall context of the society in question is necessary. This means, *inter alia*, that different forms of reparation may be suitable to deal with this type of violations and that, for instance, collective reparation measures are more suitable than individual reparation measures. In order to better identify these forms of reparation, consideration should be given to victims' needs and expectations in the aftermath of gross human rights violations.

This was well expressed by Judge Cançado-Trindade, who recommended the adoption of a different approach for reparation of human rights violations:

The criteria of determination of reparations, of an essentially patrimonial content (civil law analogies), do not appear to us entirely adequate or sufficient when transposed into the domain of the International Law of Human Rights, endowed with a specificity of its own. There is pressing need, in our days, in the ambit of International Human Rights Law, to develop the forms of reparations as from the perspective of the victims themselves, of their needs, aspirations and claims. The whole chapter of reparations for violations of human rights is... to be constantly reassessed as from the perspective of the integrality of the personality of the victims themselves, bearing in mind the fulfilment of their aspirations as human beings and the restoration of their dignity.¹⁷²

In a number of separate and dissenting opinions before the IACtHR as well as before the International Court of Justice, Judge Cançado-Trindade repeatedly challenged 'the "logic" – or rather, the lack of logic – of the *homo economicus* of our days, to whom, amidst the new idolatry of the god-market, everything is reduced to the fixing of compensation'.¹⁷³ The position of Judge Cançado-Trindade — confirmed by the most recent case law of human rights supervisory bodies, as will be explored in the next subsections — that the concept of reparation for human rights violations, particularly those of a serious character, must be based 'on the consideration of the victim as an integral human being'.¹⁷⁴ Therefore, reparation cannot consist only of compensation for material and moral damages but must also include, important non-pecuniary forms of reparation that are better suited to addressing the needs and expectations of victims in the aftermath of serious violations of their rights. This is because the monetary value of harm suffered as a consequence of this type of violations cannot always be assessed:

¹⁷² A.A. Cançado Trindade, 'The International Law of Human Rights at the Dawn of the XXIst Century', in J. Cardona Lloréns (ed.), *Bancaja Euromediterranean Courses of International Law* (Pamplona: Aranzadi: 2000) 145-221, at 171-172.

¹⁷³ IACtHR, Separate Opinion of Judge A.A. Cançado Trindade, *Villagrán Morales et al v. Guatemala*, Judgment (Reparations and Costs), 26 May 2001, § 35.

¹⁷⁴ *Ibid.*, § 37.

What is the price of a human life? What is the price of the integrity of the human person? What is the price of the liberty of conscience, or of the protection of the honour and of the dignity? What is the price of the human pain or suffering? If the indemnizations are paid, would the “problem” be “resolved”?¹⁷⁵

As such, before analysing the legal framework and the case law relating to reparation for victims of gross violations of human rights, it is necessary to briefly address the issue of victim’s needs and expectations from a theoretical perspective.

4.1.2 *Victims’ Needs and Expectations in the Aftermath of Gross Human Rights Violations*

The needs and expectations of victims of gross human rights violations may vary significantly on the basis of the nature and consequences of the violations, as well as in relation to the cultural differences and the degree of education and information of victims. Nonetheless, it is possible to identify some common features regarding victims’ needs in the aftermath of gross violations. As observed above, it may be helpful to consider these common features when elaborating on forms of reparation for victims of gross violations of human rights.

One of the first needs of victims is to obtain knowledge and clarification of the facts leading to gross violations of human. This is, for instance, the case for any disappearance, be it for a kidnapping, a war, or any other reason. Relatives of disappeared persons continue to look for them in the hope that they will find a trace of them. Searching for truth is not only about knowing the whereabouts of a disappeared person, rather, victims feel the need to know the details of the violation as a precondition before becoming reconciled with the reality of the crime and, eventually, in order to start the healing process.¹⁷⁶ This is the case for people who are indirect victims whose relatives have been killed or have disappeared as well as for direct victims who survived a violation and need to understand why this happened to them and also who did this to them.

It has been submitted that not all victims want to know the truth about the violations suffered; rather, some victims would simply want to ‘turn the page’ and forget.¹⁷⁷ Nonetheless, it may be argued that the general willingness to forget is not at odds with the

¹⁷⁵ *Ibid.*, § 36.

¹⁷⁶ For a thorough evaluation of the debate among transitional justice scholars and psychologist on the restorative value of truth, see P.B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 2nd ed. (New York: Routledge, 2011), at 145-162.

¹⁷⁷ M. Schotsmans, ‘Victims’ Expectations, Needs and Perspectives after Gross and Systematic Human Rights Violations’, in K. de Feyter, S. Parmentier, M. Bossuyt, and P. Lemmens (eds), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*, *supra* note no. 72, 105-133, at 123, referring to people in Sierra Leone saying all the time: “We want to forgive, we want to forget”.

need to know what happened. An important victims' organization in Rwanda called 'Ibuka' (meaning 'remember') has as its slogan: 'Before you can turn the page you have to read it'.¹⁷⁸ Indeed, victims cannot simply forget, even if they sometimes tend to remove memories as a psychological mechanism of self-protection.¹⁷⁹ History reveals that the need to find the truth is one of the most prevalent desire of victims: the *Pinochet* case, the *Habré* case and the case of the Stolen Generations of aboriginals are only some examples of gross human rights violations committed in the past, but not wanting to be forgotten nor being forgotten by the victims. This is also confirmed by the case law of the Inter-American Court of Human Rights, as observed above, which has often included the obligation to 'memorialize' as a form of reparation for gross violations of human rights.¹⁸⁰

It remains unclear, however, whether it is sufficient for victims to obtain the truth about the violations through a truth commission, or whether criminal proceedings are considered as the most suitable means. On the one hand, some victims prefer criminal trials because the establishment of the truth is linked to individual accountability of the offenders.¹⁸¹ On the other hand other victims may prefer truth commissions because they generally allow them more space to tell their stories than before criminal courts.¹⁸²

However, in general terms, both mechanisms are recognised as having a reparative function and need not be considered as alternatives.¹⁸³ This is especially because victims do not only want to know the truth about the violations suffered but also want acknowledgment of the causes of their suffering and of the wrongful nature of the acts they suffered from and the condemnation of such acts and of those responsible.¹⁸⁴ Such acknowledgment indicates to victims that what occurred was wrong and that it was a breach of the norms and values protected by the society, thereby restoring victims' trust in the state, society or in their fellow citizens. Acknowledgments may come from different sources: (i) the perpetrators themselves, although this possibility is only rarely realised in practice, as most often perpetrators are

¹⁷⁸ Ibid.

¹⁷⁹ C. Sedikides and J.D. Green, 'Memory as a self-protective mechanism', 3 *Social and Personality Psychology Compass* (2009) 1055-1068.

¹⁸⁰ See below Section 4.2.2.B (iii).

¹⁸¹ R. Aldana-Pindell, 'In Vindication of Justiciable Victims' Right to Truth and Justice for State-sponsored Crimes', 35 *Vanderbilt Journal of International Law* (2002) 1399-1502, at 1438; M. Humphrey, 'From Victim to Victimhood: Truth Commissions and Trials as Rituals of Political Transition and Individual Healing', 14 *The Australian Journal of Anthropology* (2003) 171-187.

¹⁸² P.B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, *supra* note no. 176, at 147-152.

¹⁸³ D. Shelton, *Remedies in International Human Rights Law*, *supra* note no. 5, at 277.

¹⁸⁴ M. Schotsmans, 'Victims' Expectations, Needs and Perspectives after Gross and Systematic Human Rights Violations', *supra* note no. 177, at 114-120. For an empirical study on victims' desires in the aftermath of atrocities, see E. Kiza, C. Rathgeber, H-C. Rohne, *Victims of War: An Empirical Study on War-Victimization and Victims' Attitudes towards Addressing Atrocities* (Hamburg: Hamburger Edition, 2006).

unwilling to acknowledge the violations committed by them, or may be untouchable due to immunities or amnesty (in any case, even if the offender is brought to justice, this does not mean that he or she is willing to acknowledge the violation he or she is responsible for); (ii) the person bearing responsibility over the actual perpetrator; and (iii) an official body, such as a court of justice, a truth commission or a commission of inquiry.

Finally, victims may want some kind of reparation, although not necessarily material compensation. As observed above, financial compensation cannot compensate the loss of a family member, since there is no price for such suffering. Furthermore, monetary compensation produces ambivalence among many victims and is often considered peripheral to the healing process. In this respect, material reparation, in the absence of forms of public recognition of the harm suffered by the victims, has been considered as ‘buying silence or “blood money”’.¹⁸⁵ The assumption that the most obvious need for victims is for compensation has been thus increasingly challenged and a ‘return to a symbolic dimension’¹⁸⁶ has been introduced instead. As will be further illustrated in this Chapter, the symbolic dimension of reparation is the main characteristic of the distinct redress regime for victims of gross human rights violations.

4.2 The Legal Framework for a Distinct Redress Regime for Victims of Gross Human Rights Violations

4.2.1 International Legal Instruments Specifically Dealing with Reparation for Gross Violations of Human Rights

As observed above, in instances of gross human rights violations some measures of reparation may be more suitable than others to repair the harm suffered by victims. Specific examples of those measures that are particularly relevant in cases of serious violations of human rights can be found in two documents recently adopted in the context of the UN, namely the UN Principles on Reparation¹⁸⁷ and the *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (‘Principles on Impunity’).¹⁸⁸

¹⁸⁵ N. Roth Arriaza, ‘Punishment, Redress and Pardon: Theoretical and Psychological Approaches’, in Idem (ed.), *Impunity and Human Rights in International Law and Practice* (Oxford: Oxford University Press, 1995), 13-23, at 21.

¹⁸⁶ M.L. Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Boston: Beacon Press, 1998), at 110.

¹⁸⁷ *Supra* note no. 48.

¹⁸⁸ Commission on Human Rights, *Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, Diane Orentlicher; *Addendum: Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005.

The Principles on Reparation, after indicating the various forms of reparation (restitution, compensation, rehabilitation and satisfaction), sets out a detailed list of measures of satisfaction, including:

a) Effective measures aimed at the cessation of continuing violations; (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations; (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities; (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; (e) Public apology, including acknowledgement of the facts and acceptance of responsibility; (f) Judicial and administrative sanctions against persons liable for the violations; (g) Commemorations and tributes to the victims; (h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.'¹⁸⁹

Arguably, the detailed list of satisfaction measures indicates how important this form of reparation is in the context of gross human rights violations. In particular, special emphasis is put on those measures which, as indicated in Section 4 of this Chapter, offer a significant contribution to victims' healing and closure; namely the search for and the acknowledgment of the truth and of responsibility. In this sense, the right to reparation is closely linked to the right to truth and the right to justice which will be the object of a separate analysis in Chapter III.

In this respect, the UN Principles on Impunity recognise, for instance, that the final report of truth commissions should be made public and 'be disseminated as widely as possible'¹⁹⁰ and that '[i]n the case of forced disappearance, the family of the direct victim has an imprescriptible right to be informed of the fate and/or whereabouts of the disappeared person'.¹⁹¹ Moreover, the Principles on Impunity recognise that victims have a right to justice¹⁹² corresponding to the state's obligation to ensure 'that those responsible for serious crimes under international law are prosecuted, tried and duly punished.'¹⁹³ Finally, these Principles also acknowledge that an important aspect of reparation that can provide a measure

¹⁸⁹ *UN Principles on Reparation*, Principle 9, § 22.

¹⁹⁰ *UN Principles on Impunity*, Principle 13.

¹⁹¹ *Ibid.*, Principle 4.

¹⁹² *Ibid.*, Principles 19-30.

¹⁹³ *Ibid.*, Principle 1.

of satisfaction to victims is public commemoration.¹⁹⁴ Such a measure is particularly important in cases of violation of rights of a group or a large community or in cases of historical violations.

Neither the Principles on Reparation nor the Principles on Impunity are legally binding instruments. Nonetheless, they both provide a crucial benchmark on the issue of victims' reparation in cases of gross human rights violations. The Principles on Reparation, which were developed during a fifteen-year period,¹⁹⁵ explicitly state in the preamble that they 'identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights and international humanitarian law, which are complementary though different as to their norms.'¹⁹⁶ Even when still in draft form the Principles on Reparation were cited in the practice of human rights bodies. Furthermore, the fact that they were adopted by consensus at the General Assembly strengthened their status under international law. Similarly, the Principles on Impunity were elaborated over eight years and eventually endorsed by the Human Rights Commission. In the first version, then mandate-holder Joinet pointed out that the principles were not to be considered as legal standards but rather as guiding principles.¹⁹⁷ Similarly, the preamble of the final version refers to the principles as 'guidelines to assist States in developing effective measures for combating impunity'.¹⁹⁸

It is clear, therefore, that principles set out in these documents cannot be read as rules, but rather as standards.¹⁹⁹ However, this does not make them irrelevant. Although formally not binding, both these documents make an important contribution in defining remedies for gross human rights violations. The fact that a growing number of decisions by human rights bodies refer to them is likely to strengthen their force and influence domestic practice, possibly leading to the progressive affirmation of these standards as rules of general international law.

¹⁹⁴ *Ibid.*, Principle 3.

¹⁹⁵ For a commentary on the travaux préparatoires of the Principles on Reparation, see T. van Boven, 'Victims' Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines', in C. Ferstman, M. Goetz and A. Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Leiden: Martinus Nijhoff, 2009) 19-40.

¹⁹⁶ *Principles on Reparation*, Preamble.

¹⁹⁷ *Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)*, Revised Final Report Prepared by Mr. Joinet Pursuant to Sub-Commission Decision 1996/119, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997, § 49.

¹⁹⁸ *Principles on Impunity*, Preamble.

¹⁹⁹ The main distinction between rules and standards is that while a rule 'may entail an advance determination of what conduct is permissible, leaving only factual issues for the adjudicator', a standard 'may entail leaving both specification of what conduct is permissible and factual issues for the adjudicator'. L. Kaplow, 'Rules versus Standards: An Economic Analysis', 42 *Duke Law Journal* (1992) 557-629, at 559-560; on the distinction between rules and standards, see also P.J. Schlag, 'Rules and Standards', 33 *UCLA Law Review* (1985) 379-430.

4.2.2 *The Practice of Human Rights Supervisory Bodies on Reparation for Victims of Gross Human Rights Violations: Main Characteristics*

Since there are not many instruments dealing specifically with the right to reparation for victims of gross human rights violations, and those existing instruments have no binding value upon states, the practice of human rights supervisory bodies has been decisive for the affirmation of a distinct redress regime for this category of victims. As observed above, a review of the judicial and quasi-judicial practice of human rights supervisory bodies with the power to award (or, at the very least, to recommend) reparation to individuals whose rights have been violated indicates that restitution and monetary compensation have long been the most common remedies granted to victims. Nonetheless, more recently, these bodies have increasingly acknowledged that restitution or compensation alone, in cases of gross human rights violations, are an inadequate form of redress, considering the gravity of the harm suffered and, most importantly, the fact that most of the time injury sustained as a consequence of these violations cannot be repaired by way of restitution or compensation. Furthermore, these bodies have increasingly recognised that reparation for gross violations of human rights not only needs to take into account the material damage suffered, but also immaterial damage, such as harm to reputation, dignity and other harm the monetary value of which is difficult to quantify in exact terms.

This is not to say that, in cases of gross human rights violations, victims should be granted only symbolic reparation. Rather, monetary compensation and other measures of reparation are usually awarded cumulatively. As also clarified by the ILC in its Commentary to the Draft Articles on State Responsibility, in particular cases, reparation may only be achieved by the combination of different measures.²⁰⁰ Accordingly, human rights supervisory bodies have increasingly directed states to take specific action to remedy human rights violations. The following section will consider those measures that are representative of the redress regime for victims of gross human rights violations. In particular, the practice of human rights supervisory bodies in relation to reparation for immaterial damage through: (i) compensation, and (ii) satisfaction will be examined.

²⁰⁰ Commentary to Art. 34 of the ILC Draft Articles, annexed to the ILC Draft Articles, at 95.

A. COMPENSATION FOR IMMATERIAL DAMAGE

Reparation for immaterial damage is particularly relevant in cases of gross human rights violations since victims of these violations often suffer serious physical harm and psychological traumas. These damages are generally assessed on the basis of the costs of medical and psychological treatments necessary to recover from the harm sustained; however, when such figures are not available, immaterial damages are assessed on the basis of ‘equity’, a method which has often been used to assess harm resulting from pain, suffering and distress and for harm to the dignity of persons.²⁰¹

The right to compensation for immaterial damage has been long recognised in the practice of international law. In the *Janes* case, an arbitration tribunal held that ‘the individual grief of the claims should be taken into account’.²⁰² Similarly, in the *Lusitania* arbitration, the tribunal held:

Mental suffering is a fact just as real as physical suffering, and susceptible of measurement by the same standards. ... there can be no doubt of the reality of mental suffering, of sickness of mind as well as sickness of body, and of its detrimental and injurious effect on the individual and on his capacity to produce. Why, then, should he be remediless for this injury?²⁰³

Compensation for immaterial damage was considered in accordance with ‘applicable principles of international law’ in the case of *Letelier and Moffitt*, which was settled in arbitration proceedings between US and Chile in 1992.²⁰⁴ In that case, concerning the assassination of the Chilean economist and politician Orlando Letelier and his assistant Ronni Moffit by Pinochet’s DINA agents, the arbitral commission set out the monetary compensation for moral damage owed to the families of the two victims on the basis of similar pronouncements by the Inter-American Court of Human Rights and other arbitral tribunals. As noted by Professor Vicuña in his Separate Opinion, a distinct set of principles applies to damages for deaths and physical injuries. In that case, he affirmed, ‘[c]ompensation

²⁰¹ See e.g., IACtHR, *Velázquez Rodríguez v. Honduras*, Judgment (Reparation and Costs), 21 July 1989, § 27 (stating that compensation for emotional harm ‘must be based upon the principles of equity’); ECtHR, *Akdeniz and others v. Turkey* (App. No. 23954/94), Judgment (Merits and Just Satisfaction), 31 May 2001, § 134; *Isayeva, Yusupova and Bazayeva v. Russia* (App. Nos. 57947/00; 57948/00; 57949/00), 24 February 2005, § 246.

²⁰² *Laura M.B. Janes et al. (USA) v. the United Mexican States*, 16 November 1925, *Reports of International Arbitral Awards*, vol. IV, 82-98, at 89, § 25.

²⁰³ *Opinion in the Lusitania Cases*, 1 November 1923, *Reports of International Arbitral Awards*, vol. VII, 32-44, at 36.

²⁰⁴ *Dispute Concerning Responsibility for the Deaths of Letelier and Moffitt (United States, Chile)*, 11 January 1992, *Reports of International Arbitral Awards*, vol. XXV, 1-19.

for moral damages is clearly included among the important principles of international law in the matter.’²⁰⁵

The right to compensation for physical and mental damage is also well established in the practice of human rights supervisory bodies. The Human Rights Committee, for instance, has recommended compensation for the relatives of disappeared people, recognising that these persons have suffered harm amounting to a violation of Art. 7 ICCPR due to the anguish caused by the disappearance of their beloved ones.²⁰⁶

The Inter-American Court of Human Rights has awarded ‘moral damage’ to victims since its very first judgment on reparation and has based its assessment on equity.²⁰⁷ Since this judgment, the jurisprudence of the Court has further elaborated on the issue of immaterial damages and two main principles can be discerned: firstly, moral damages are awarded to the direct victim and to his or her family, not only in cases where the direct victim is deceased as a result of an unlawful killing or is disappeared, but also in cases in which the victim has been tortured.²⁰⁸ Secondly, close family members are awarded moral damage without having to prove having suffered actual damage. In this respect, the Court held that ‘it can be presumed that the parents have suffered morally as a result of the cruel death of their offspring, for it is essentially human for all persons to feel pain at the torment of their child.’²⁰⁹

The European Court of Human Rights has also ordered compensation to victims for immaterial damage when it has found that they have suffered anguish, psychological pain or other mental or physical harm. Where the victim has been disappeared or is deceased, the Court has awarded non-pecuniary damages to the victims’ next of kin.²¹⁰ Mental harm need not necessarily be demonstrated but may be presumed on the basis of the gravity of the violations. For instance, in *Orhan v. Turkey*, a case concerning acts of torture, the European Court of Human Rights awarded non-pecuniary damages on account of the simple finding of the violation and on the ‘gravity of the breaches on question’.²¹¹ Like its Inter-American

²⁰⁵ *Ibid.*, Separate Concurrent Opinion of Professor Francisco Orrego Vicuña, § 9.

²⁰⁶ HRC, *Almeida de Quinteros et al v. Uruguay* (Comm. No. 107/1981), UN Doc. CCPR/C/19/D/107/1981, 21 July 1983, §§14, 16; *Sarma v. Sri Lanka*, *supra* note no. 118, §§ 9.5, 11.

²⁰⁷ See *supra* note no. 201.

²⁰⁸ See e.g. IACtHR, *Loayza Tamayo v. Peru*, Judgment (Reparations and Costs), *supra* note no. 141, §§ 140-143, awarding compensation for moral damage to the direct victim’s children, parents and siblings, in view of the fact that ‘as members of a close family could not have been indifferent to Ms. Loayza-Tamayo’s terrible suffering’.

²⁰⁹ IACtHR, *Aloeboetoe v. Suriname*, *supra* note no. 140, § 76. See on the contrary, *La Cantuta v. Peru*, *supra* note no. 137, §§ 216-220; cf. *Concurring Opinion in the Interpretation of the Judgment in the case of La Cantuta v. Peru by Judge Cançado Trindade*, §§ 44, 46.

²¹⁰ E.g., ECtHR, *Ipek v. Turkey* (App. No. 25760/94), Judgment (Merits and Just Satisfaction), 17 February 2004, § 237.

²¹¹ ECtHR, *Orhan v. Turkey* (App. No. 25656/94), Judgment (Merits and Just Satisfaction), 18 June 2002, § 443.

counterpart, the Court has awarded non-pecuniary damages to relatives of the victims in view of the extremely serious violations suffered by the victims that undoubtedly caused their relatives anxiety and distress. In other cases, the Court considered that the relatives of victims suffered ‘feeling of frustration, distress and anxiety’²¹² from the lack or inefficient of an investigation over the facts that caused the violation.

A recent development in relation to reparation for immaterial damage in cases of gross human rights violations concerns compensation for damages to the ‘life plan’ of the victim, that is the full self-actualization of the victim both from a personal and a professional perspective. Awards for damage to the life plan, in particular, take into account the difficulties that a victim of gross violations of human rights may experience in finding a place in the society and in restoring his or her dignity. At present, this practice is limited to the Inter-American Court of Human Rights which in a number of cases ordered the state responsible to cover the costs of education and professional training in order to compensate damage to the life plan (*proyecto de vida*).²¹³

The human rights jurisprudence has also influenced the recent decision by the International Court of Justice in the *Diallo* case, in which, as noted above, the Court ruled for the first time on compensation for human rights violations. In that case, the Court awarded the wronged state a considerable sum for immaterial damage suffered by the individual victim. Relying on the case law of human rights supervisory bodies, the Court found that there is no need to prove immaterial damage, since it ‘is an inevitable consequence of the wrongful acts ... already ascertained by the Court’.²¹⁴ Moreover, the Court stated that determination of the quantum owed for immaterial damage ‘necessarily rests on equitable considerations’,²¹⁵ in accordance with the human rights jurisprudence analysed above.

²¹² ECtHR, *McKerr v. United Kingdom* (App. No. 28883/95), Judgment (Merits and Just Satisfaction), 4 May 2001, § 181; *Shanaghan v. United Kingdom* (App. No. 37715/97), Judgment (Merits and Just Satisfaction), 4 May 2001, § 181; *Hugh Jordan v. United Kingdom* (App. No. 24746/94), Judgment (Merits and Just Satisfaction), 4 May 2001, § 170; *Kelly and Others v. United Kingdom* (App. No. 30054/96), Judgment (Merits and Just Satisfaction), 4 May 2001, § 164.

²¹³ IACtHR, *Loayza Tamayo v. Peru*, *supra* note no. 141, §§ 144-154; *Cantoral-Benavides v. Peru*, Judgment (Reparations and Costs), 3 December 2001, § 80; *Gutiérrez-Soler v. Colombia*, Judgment (Merits, Reparations, and Costs), 12 September 2005, § 89; *Baldéon-García v. Peru*, Judgment (Merits, Reparations, and Costs), 6 April 2006, § 206.

²¹⁴ ICJ, *Ahmadou Sadio Diallo*, Compensation Judgment, *supra* note no. 59, § 21.

²¹⁵ *Ibid.*, § 24.

B. SATISFACTION

Satisfaction is a non-monetary form of reparation for immaterial damage. In many cases, international tribunals have decided that condemnatory judgment may constitute satisfaction *per se*, since it provides victims with an official and binding decision as to the fact the victim has suffered a violation of his or her rights.²¹⁶ Human rights bodies, however, have increasingly considered that in cases of gross human rights violations a judgment alone does not provide adequate reparation to victims: such violations demand compensation. Moreover, these bodies have required states to undertake specific measures to provide victims with satisfaction for the moral harm suffered. These actions may be grouped into three large categories according to their ultimate aim: (i) disclosure of the truth; (ii) apology and public acknowledgment of responsibility; (iii) accountability of those responsible for the violations.

i. Disclosure of the Truth

As observed above, one of the most important forms of reparation for victims of gross violations of human rights is the search for the truth. In the interpretation of human rights supervisory bodies, the truth as a measure of remedy is conceived as the right to a judicial search for truth and investigation. The affirmation of investigation into the facts surrounding the alleged violation as an element of victims' right to remedy in instances of gross human rights violations is well-established in the practice of UN treaty bodies,²¹⁷ the European Court of Human Rights²¹⁸ and the Inter-American Court of Human Rights.²¹⁹ The right to an investigation has been espoused by these bodies as an indispensable precondition for prosecuting those allegedly responsible for the violations, which, as will be illustrated in

²¹⁶ ICJ, *Corfu Channel* (United Kingdom v. Albania), *ICJ Reports* 1949, p. 26, 9 April 1949, at 36. ECtHR: *Golder v. United Kingdom* (App. No. 4451/70), Judgment (Merits and Just Satisfaction), 21 February 1975, § 46; *Öcalan v. Turkey* (App. No. 4451/70), Judgment (Merits and Just Satisfaction), 12 March 2003, § 250; IACtHR: *Cesti Hurtado v. Peru*, Judgment (Reparations and Costs), 31 May 2001, § 59.

²¹⁷ HRC: *Rodríguez v. Uruguay*, *supra* note no. 109, § 12(3). See also *José Vicente and Amado Villafañe Chaparro et al. v. Colombia* (Comm. No. 612/1995), UN Doc. CCPR/C/60/D/612/1995, 29 July 1997, § 8.8; *Blanco v. Nicaragua* (Comm. No. 328/188), UN Doc. CCPR/C/51/D/328/1988, 18 August 1994, § 12. CERD Committee, *L.K. v. The Netherlands*, *supra* note no. 96, § 6; CAT Committee, *Barakat v. Tunisia* (Comm. No. 60/1996), UN Doc. CAT/C/23/D/60/1996, 10 November 1999, §§ 11.10 and 12.

²¹⁸ ECtHR, *Kaya v. Turkey* (App. No. 168/1996/777/978), Judgment (Merits and Just Satisfaction), 19 February 1998, § 107; *Bitiyeva and x. v. Russia* (App. Nos 57953/00 and 37392/03), Judgment (Merits and Just Satisfaction), 21 June 2007, § 156 with further references.

²¹⁹ IACtHR: *Blake v. Guatemala*, *supra* note no. 96, § 97; *Villagrán Morales et al. v. Guatemala*, *supra* note no. 96, § 225; *Castillo Páez v. Peru*, *supra* note no. 87, § 90; *Durand and Ugarte v. Peru*, *supra* note no. 100, § 130; *Bámaca Velásquez v. Guatemala*, Judgment (Merits), 25 November 2000, § 197; *Las Palmeras v. Colombia*, Judgment (Merits), 6 December 2001, § 65; *Juan Humberto Sánchez v. Honduras*, Judgment (Preliminary Objections, Merits, Reparations, and Costs), 7 June 2003, §§ 121-136.

Chapter III, is also emerging as an integral element of victims' right to remedy. For instance, in a case concerning an alleged unlawful killing, the ECtHR found that

[T]he notion of an effective remedy for the purposes of Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure.²²⁰

Notably, in a number of cases, these organs have held that non-judicial bodies, such as truth commissions, cannot act as a substitute for this right, as they 'cannot be considered as a suitable substitute for proper judicial procedures as a method for arriving at the truth'.²²¹

The importance of full disclosure of the truth as a form of remedy for victims is also illustrated by the fact that, in instances of gross human rights violations, some human rights bodies have used their remedial jurisdiction to order measures to that end. In cases of serious breaches of human rights, the Inter-American Court of Human Rights has often directed states to ensure a full and public disclosure of the truth²²² and, for instance, the identification of a deceased or disappeared person's remains.²²³ Similarly, in a number of occasions, the African Commission of Human Rights, upon finding violations of human rights, has recommended the respondent state to investigate the circumstances of the violations with a view of identifying the persons responsible for them. For instance, in a disappearance case, the African Commission recommended the state to 'arrange for the commencement of an independent enquiry in order to clarify the fate of the persons considered as disappeared, identify and bring to book the authors of the violations perpetrated at the time of the facts arraigned.'²²⁴

In contrast, the European Court of Human Rights remains reluctant in indicating non-monetary relief for applicants under Article 41. Even when it has done so, it has limited itself

²²⁰ ECtHR, *Kaya v. Turkey*, *supra* note no. 218, § 107; see also *Keenan v. United Kingdom*, *supra* note no. 91, § 122; *Assenov and Others v. Bulgaria* (App. No. 90/1997/874/1086), Judgment (Merits and Just Satisfaction), 28 October 1998, § 117; *Kurt v. Turkey* (App. No. 23164/09), Judgment (Merits and Just Satisfaction), 25 May 1998, § 40.

²²¹ IACoHR, Case 10.488, *Ignacio Ellacuría S.J. et al (El Salvador)*, 22 December 1999, § 229.

²²² IACtHR, *Villagrán Morales et al. v. Guatemala*, *supra* note no. 96, § 253.8; *Durand and Ugarte v. Peru*, *supra* note no. 100, § 39.c; *Cantoral-Benavides v. Peru*, *supra* note no. 213, §§ 69-70; *Bámaca Velásquez v. Guatemala*, Judgment (Reparations and Costs), 22 February 2002, §§ 74-76; *Barrios Altos v. Peru*, Judgment (Merits), 14 March 2001, §§ 47-49.

²²³ IACtHR, *El Caracazo v. Venezuela*, Judgment (Reparations and Costs), 29 August 2002, §§ 121-125; *Castillo Páez v. Peru*, *supra* note no. 87, § 90; *Trujillo Oroza v. Bolivia*, Judgment (Reparations and Costs), 27 February 2002, § 91.a; *Caballero-Delgado and Santana v. Colombia*, Judgment (Reparations and Costs), 29 January 1997, § 66.4.

²²⁴ AfriComHR, *Amnesty International v. Mauritania*, *supra* note no. 163, 11 May 2000, recommendations, lit. 1.

to ordering restitution,²²⁵ a measure that, as has been shown, is not adequate to deal with certain gross violations of human rights.

ii. *Apology and Public Acknowledgment*

Beyond the finding of facts, apology and public acknowledgment of the wrongful nature of the facts is also an essential part of victims' reparation for gross violations of human rights. Thus far, however, only the Inter-American Court has ordered responsible states to issue official statements accepting responsibility and apologising.²²⁶ The responsible state, for instance, has been required to provide reparation to victims of gross human rights violations

[B]y the execution of acts or works of a public nature or repercussion, which have effects such as recovering the memory of the victims, re-establishing their reputation, consoling their next of kin or transmitting a message of official condemnation of the human rights violations in question and commitment to the efforts to ensure that they do not happen again.²²⁷

Besides statements of acceptance of responsibility and expressions of regret by the responsible state, the Court has also ordered that its judgment be published in the local media²²⁸ or that public ceremonies be held, where victims officially receive awards of compensation and the state accepts responsibility and 'make amends' to the victims.²²⁹

iii. *Memorialisation*

Another important measure of acknowledging the wrongful conduct and the injuries suffered by victims is public commemoration. To this end, the Inter-American Court of Human Rights has determined that the state should construct monuments or name streets, schools, plazas, memorials or commemorative scholarships in honour of the victims' memory.

²²⁵ ECtHR, *Assanidze v. Georgia*, *supra* note no. 134, 8 April 2004, § 203 (urging the respondent state to 'secure the applicant's release at the earliest date possible').

²²⁶ IACtHR, *Durand and Ugarte*, Judgment (Reparations and Costs), 3 December 2001, § 39.b; *Bámaca Velásquez v. Guatemala*, *supra* note no. 222, § 106.3; *Barrios Altos v. Peru*, Judgment (Reparations and Costs), 30 November 2001, at § 44.

²²⁷ IACtHR, *Villagrán Morales et al. v. Guatemala*, *supra* note no. 173, § 84.

²²⁸ IACtHR, *Trujillo Oroza v. Bolivia*, *supra* note no. 223, § 119; *Barrios Altos v. Peru*, *supra* note no. 226, § 44 (d) and operative paragraph 5 d); *Cantoral-Benavides v. Peru*, *supra* note no. 213, § 79; *Durand and Ugarte v. Peru*, *supra* note no. 226, § 39 a) and operative paragraph 3 a); *Bámaca Velásquez v. Guatemala*, *supra* note no. 222, § 84; *El Caracazo v. Venezuela*, *supra* note no. 223, § 128; *Juan Humberto Sánchez v. Honduras*, *supra* note no. 219, § 188.

²²⁹ IACtHR, *Heliodoro Portugal v. Panama*, Judgment (Preliminary Objections, Merits, Reparations, and Costs), 12 August 2008, § 249.

For instance, in the case of the *Street Children*, where five children were extrajudicially executed, the Court ordered ‘to designate an educational center with a name allusive to the young victims in this case and to place in this center a plaque with the names’.²³⁰ In *Myrna Mack-Chang v. Guatemala*, a social activist was unlawfully killed and the Court ordered as a measure of reparation to ‘name a well-known street or square in Guatemala City in honor of Myrna Mack-Chang, and place a prominent plaque in her memory at the place where she died or nearby, with a reference to the activities she carried out’.²³¹ In certain cases, the Court commended the state for undertaking efforts to memorialise the victims and gave specific directions as to how to better repair the harm suffered by the victims. For example, in *Goiburú et al. v. Paraguay*, after commending the Paraguayan government for dedicating a public square in honour of the victims of a series of forced disappearances, the Court observed that, to serve as a reparation, the State had to erect another monument including a plaque listing the victims’ names and the circumstances that led to their disappearances.²³²

iv. Accountability of Individual Perpetrators

Human rights bodies have increasingly indicated that states must prosecute those allegedly responsible of the violations as part of victims’ right to an effective remedy in cases of gross violations of human rights, such as in the case of violations of the right to life and to personal integrity. This issue will be the object of a separate analysis in Chapter III.

²³⁰ IACtHR, *Villagrán Morales et al. v. Guatemala*, *supra* note no. 173, § 103.

²³¹ IACtHR, *Myrna Mack-Chang v. Guatemala*, Judgment (Merits, Reparations and Costs), 25 November 2003, § 286. See also *La Cantuta v. Peru*, *supra* note no. 137, § 236 (‘the State must ensure that, within the term of one year, the 10 individuals declared executed or forcefully disappeared victims in the instant case shall be represented in said memorial if they are not represented so far and provided their relatives so desire’); *The Rochela Massacre v. Colombia*, Judgment (Merits, Reparations and Costs), 11 May 2007, § 277 (the Court ordered that a photographic gallery representing the victims of the massacre be installed in a ‘visible and dignified place’ in a courthouse); *Serrano-Cruz Sisters v. El Salvador*, Judgment (Merits, Reparations and Costs), 1 March 2005, § 196 (the Court ordered that the State to ‘designate a day dedicated to the children who, for different reasons, disappeared during the internal armed conflict’)

²³² IACtHR, *Goiburú et al. v. Paraguay*, Judgment (Merits, Reparations and Costs), 22 September 2006, §§ 174-177.

5 CONCLUDING REMARKS

This Chapter has explored the gradual recognition of victim's right to reparation in international law. As laid out at the beginning of this Chapter, international law traditionally considered the issue of reparation as an inter-state measure. Nonetheless, in the preceding decades a number of developments in different branches of international law have produced important changes in relation to the position of individuals as holders of a right to reparation for international wrongful acts.

Specific provisions recognising an individual right to reparation have been included in all major human rights treaties, which have been widely ratified by states. Likewise, the creation of human rights supervisory bodies, both at the international and at the regional level, signals a broad acceptance of states obligations towards individuals. The jurisprudence of the International Court of Justice and the ILC Articles on State Responsibility support this trend. As discussed in this Chapter, in the recent judgment on reparation in the *Diallo* case, the ICJ determined the heads of damage and the quantum of compensation by referring to the jurisprudence of human rights bodies and focussed on the position of the injured individual, rather than on the wronged state. As Judge Cançado-Trindade observed in his Separate Opinion to judgment, '[t]he subject of the rights violated in the *cas d'espèce* was a human being, Mr. A.S. Diallo, not a State. Likewise, the subject of the corresponding right to reparation is a human being, Mr. A.S. Diallo, not a State.'²³³

It remains true, however, that whereas individuals enjoy an enforceable right to claim and obtain redress in the treaty-based framework of international human rights law, whether individuals also hold this right outside that framework remains questionable. In particular, whether individuals have a right to reparation for violations of the laws and customs of war remains much contested among legal scholars and in domestic practice, whereby the duty to compensate as expressed in international humanitarian law treaties has been often interpreted, although with certain exceptions, as an inter-state obligation to be settled between states that does not give rise to any subsequent obligation of the wronged state to distribute damages to individual victims. This interpretation has also been confirmed by the recent decision of the ICJ in the *Germany v. Italy* case, whereby the majority of the Court found that:

²³³ ICJ, *Separate Opinion of Judge Cançado Trindade, Ahmadou Sadio Diallo*, Compensation Judgment, *supra* note no. 59, § 5.

Where the State receiving funds as part of what was intended as a comprehensive settlement in the aftermath of an armed conflict has elected to use those funds to rebuild its national economy and infrastructure, rather than distributing them to individual victims amongst its nationals, it is difficult to see why the fact that those individuals had not received a share in the money should be a reason for entitling them to claim against the State that had transferred money to their State of nationality.²³⁴

Therefore, at this stage, the access of individuals to state reparation outside the treaty-based framework of human rights does not seem to be entrenched in a rule of general international law, although certain scholars²³⁵ and judicial bodies have supported such view.²³⁶ Given the rapidly evolving legal framework and case law on the right to reparation, however, it is not unrealistic to expect that an individual right to reparation under general international law is likely to emerge in the coming years under the auspices of a growing number of legal documents asserting such a right, such as the 2005 UN Basic Principles on the Right to Reparation and the case law of judicial bodies, both at the national and international level.

Apart from the progressive affirmation of a right to reparation for individuals and groups victims of international wrongful acts under general international law, this Chapter has also discussed the emergence of a distinct redress regime for victims of serious violations of human rights. Indeed, the case law of human rights supervisory bodies indicates that there is an emerging consensus in relation to the elements of reparation for victims of serious violations of human rights. Despite the differences in the formulation of the relevant redress provisions, judicial and quasi-judicial bodies are developing a similar practice with regard to the contents of the duty of states to provide victims with an effective remedy. Furthermore, these bodies have also been able to further elaborate the content of victims' reparation through their remedial jurisdiction, which gives them the power to award (or at least to recommend) reparation to individuals where they find a violation of a convention right.

The remedial jurisdiction of human rights supervisory bodies is particularly important in cases of gross human rights violations; indeed, in such cases, human rights bodies have used this power to direct states to undertake specific measures to repair the harm suffered by victims. As discussed in this Chapter, the contents of the right to reparation vary according to

²³⁴ ICJ, *Jurisdictional Immunities of the State*, *supra* note no. 17, § 102.

²³⁵ C. Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, *supra* note no. 120, at 125-128.

²³⁶ According to the IACtHR, Art. 63(1) ACHR codifies a rule of customary law. See *Aloeboetoe et al. v. Suriname*, *supra* note no. 140, § 43; Special Tribunal for Lebanon, Order Assigning Matter to the Pre-Trial Judge, *El Sayed*, President, 15 April 2010, § 20, affirming that 'The right of access to justice (and the consequential right to be afforded judicial remedy) for the protection of one's rights is part of international customary law.'

the circumstances of the violation. Although the principle of *restitutio in integrum* acts as a reference, in the context of gross and systematic violations it may often be impossible to undo the harm suffered by victims, or restitution may even produce undesirable results; furthermore, compensation alone has often been considered inadequate to repair the harm suffered. For this reason, it has been argued that a distinct redress regime is emerging for this type of violations.

This regime distinguishes itself from the traditional approaches to reparation for the particular emphasis which is placed upon pecuniary (compensation) and non-pecuniary (satisfaction) reparation for immaterial damage. Immaterial damage is especially relevant in cases of gross violations of human rights, which may cause both serious physical and mental harm of victims and their relatives, as well as harm to the dignity and reputation of the victims.²³⁷

In relation to physical and mental harm, human rights bodies have found that states are under the duty to provide victims and their relatives with monetary compensation, often calculated on the basis of equity. Moreover, in such cases, harm suffered by victims' next of kin is presumed on the basis of the gravity of the violation suffered and need not to be proven by the claimants. Injuries to the dignity of victims are instead repaired through the performance of other obligations which satisfy the needs and expectations of victims in the aftermath of gross violations, including the establishment of the truth, the public acknowledgment of the wrongfulness character of the fact, the memorialisation of the victims and, as Chapter III will discuss in detail, the criminal accountability of those responsible for the violations.

As noted above, the remedial jurisdiction of human rights supervisory bodies has been essential for the affirmation of this distinct redress regime. In this framework, the cautious approach maintained by the European Court of Human Rights with regard to its remedial jurisdiction under Article 41 of the ECHR appears today not only inadequate to properly address gross human rights violations, but also inconsistent with its practice on the right to effective remedy. Whereas the Court has indicated that compensation alone does not constitute a sufficient remedy for gross violations of human rights under Article 13, it has often limited itself to ordering only this form of reparation pursuant to Article 41. In other

²³⁷ The fundamental nature of reparation for immaterial damage was recently expressed by Judge Cançado Trindade, in his Separate Opinion in the Diallo case cited above: 'On the basis of my own experience of magistrate serving successively two international jurisdictions, that of the IACtHR and then of the ICJ, I attribute particular importance to reparations for moral damages. In some cases, of particular gravity, I dare to say that they prove to be even more significant or meaningful to the victims than those for pecuniary damages, or indemnizations.' (*supra* note no. 233, § 80).

words, the Court has never used its remedial jurisdiction to order reparation other than in the form of compensation, declaratory relief and restitution, measures that, as the Court itself has recognised, can only partially repair the harm suffered by victims of gross human rights violations.

Arguably, the progressive affirmation of a ‘symbolic’ dimension of reparation is likely to influence the future interpretation of the Court’s remedial power. A broader interpretation of the Court’s remedial jurisdiction will not only bring this body in line with its universal and regional counterparts, but will also ensure that victims of gross human rights violations ultimately receive adequate reparation for the serious harm suffered.

Chapter II

The Concept of Victim in Situations of Gross Human Rights Violations and International Crimes

1 INTRODUCTORY REMARKS

In situations characterised by systematic and gross human rights violations or in the case of an armed conflict a large number of people may potentially be affected, all of whom would in principle be entitled to be recognised as ‘victims’. A tension may, however, arise when the recognition of victim status is associated with certain rights such as the right to have *locus standi* in judicial proceedings or the right to claim reparation. In particular, the large number of persons involved may overwhelm the limited capacity of the competent *fora*. As such, before discussing the challenges of affording justice and reparation to victims in the context of gross human rights violations and international crimes, it is first necessary to clarify who are the subjects belonging to this category.

The aim of this Chapter is to determine who is eligible to exercise rights as victims or injured persons among the often substantial number of people potentially affected by gross violations of human rights and international crimes. Whilst identifying those eligible to exercise rights in seeking reparation inevitably varies from case to case, it is submitted that it nonetheless possible to identify a general framework to determine the recipients of rights in the context of gross human rights violations and international crimes. In other words, a conceptualisation of victimhood in mass victimisation can be elaborated.

Arguably, this conceptualisation needs to be construed on the basis of how the concept of victim has arisen in international law and, more specifically, in those branches which are more relevant to mass victimisation, namely international humanitarian law (‘IHL’), international human rights law (‘IHRL’) and international criminal law (‘ICL’). Whereas an authoritative definition of victim that can be applied across the international legal order does not exist, these three bodies of law have contributed considerably to the development of this concept within their respective areas. Moreover, these three disciplines, because of the intrinsic similarities between the violations they deal with, have often referred to each other’s elaboration of the concept of victim.

This Chapter argues that the increasing cross-pollination between these branches of international law with respect to the identification of the subjects entitled to rights has contributed to the emergence of a shared definition of victim, centred on the concept of

'harm'. This view is also supported by the fact that recent international instruments on victims' rights have substantially upheld this shared definition. However, since the recognition of victims' rights may have a considerably different impact (for instance, on others' rights, on the efficiency of the mechanisms of enforcement of those rights, and so forth) within the various bodies of law, the concept of victim cannot be applied in a procrustean way. Rather, in this Chapter, it will be argued that this concept has to be interpreted *functionally*, that is to say according to which rights are conditioned upon the qualification of an individual as a victim.

With a view to identifying the main components of the emerging shared definition of the victim in international law this Chapter first analyses how the concept of victim has been conceptualised and applied in the distinct branches of international law indicated above. Following this analysis, it will be discussed how the emerging shared definition may be read as identifying different categories of victims thereby allowing a functional application of the definition, which is essential to effectively realise victims' rights in cases of mass victimisation.

2 THE CONCEPT OF VICTIM IN INTERNATIONAL HUMANITARIAN LAW

International humanitarian law has traditionally adopted a broad, situation-oriented approach towards the concept of victim. This liberal approach is grounded in the very spirit of IHL which aims to protect all those persons not directly participating in hostilities that are affected by armed conflicts, not only those who suffered harm as a result of a violation of the *jus in bello*. In other words, IHL is intended to attenuate the harmful effects of conflicts as far as possible: in this way the need to broaden the understanding of the concept of victim becomes clear.

The history of the Geneva Conventions and their Additional Protocols describes how a gradually broader group of victims has obtained this particular status under international humanitarian law. Generally speaking, the term ‘victim’ can be understood as indicating all people IHL seeks to protect in the event of international or non-international armed conflict, regardless of their conduct and whether or not a violation of law has been committed against them.¹ For instance, the First Geneva Convention of 1949 protects wounded enemy soldiers, although it is not forbidden to wound enemy soldiers. Similarly, the Third Geneva Convention protects captured enemy soldiers even though the capture of enemy soldiers is a lawful act of war. It should also be noted that under Article 81(1)-(3) of Additional Protocol I (‘AP I’) and Article 18(1) of Additional Protocol II (‘AP II’),² the International Committee of the Red Cross acts ‘in favour of the victims of the conflict’; the latter include without distinction all persons caught up in a conflict, and not only those who suffered from a specific violation of IHL.

¹ M. Sassòli, ‘Victims of Armed Conflicts and of Internal Strife and Tension’, in M.C Bassiouni, *International Protection of Victims* (Érès: Association Internationale de Droit Pénale, 1988) 147-180, at 151-152.

² Art. 81 AP I provides that: ‘The Parties to the conflict shall grant to the International Committee of the Red Cross all facilities, within their power so as to enable it to carry out the humanitarian functions assigned to it by the Conventions and this Protocol in order to ensure protection and assistance to the victims of conflicts; the International Committee of the Red Cross may also carry out any other humanitarian activities in favour of these victims, subject to the consent of the Parties to the conflict concerned. 2. The Parties to the conflict shall grant to their respective Red Cross (Red Crescent, Red Lion and Sun) organizations the facilities necessary for carrying out their humanitarian activities in favour of the victims of the conflict, in accordance with the provisions of the Conventions and this Protocol and the fundamental principles of the Red Cross as formulated by the International Conferences of the Red Cross. 3. The High Contracting Parties and the Parties to the conflict shall facilitate in every possible way the assistance which Red Cross (Red Crescent, Red Lion and Sun) organizations and the League of Red Cross Societies extend to the victims of conflicts in accordance with the provisions of the Conventions and this Protocol and with the fundamental principles of the red Cross as formulated by the International Conferences of the Red Cross.’ (Emphasis added).

Art. 18 AP II provides that: ‘Relief societies located in the territory of the High Contracting Party, such as Red Cross (Red Crescent, Red Lion and Sun) organizations may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict. The civilian population may, even on its own initiative, offer to collect and care for the wounded, sick and shipwrecked.’ (Emphasis added).

For this reason, it has been aptly pointed out that the concept of ‘war victims’ could also be understood as the entire population of the countries at war.³ Such a broad definition of victim is not explicitly set out in any legal document, although, as observed above, it may be inferred from the object and purpose of this body of law: the protection of war victims (in the broadest sense possible).

The category of war victims has nonetheless to be distinguished from those persons who have been personally harmed by a violation of IHL. Humanitarian law does not specifically deal with this smaller category of victims despite the fact that it is only to them that international legal instruments grant the right to remedy and reparation. This gap has been filled by the *UN Basic Principles and Guidelines on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Serious Violations of International Humanitarian Law* (‘UN Basic Principles’), which define victims as follows:

[V]ictims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law.⁴

Accordingly, the UN Basic Principles identify four categories of victims: (i) individuals who have suffered direct harm as a result of a violation of human rights law or international humanitarian law; (ii) immediate family or dependents who suffered harm as a result of the primary victimisation, for example material loss as a result of the death of a next of kin, serious injury of the primary income earner, or emotional suffering from the death of a relative resulting from a primary violation; (iii) individuals who have been injured while intervening to prevent victimisation of others; and (iv) collective victims.⁵ It is remarkable that these Principles link the concept of victim to the entitlement to reparation. Indeed, the

³ L. Zegveld, ‘Remedies for Victims of Violations of International Humanitarian Law’, 85 *International Review of the Red Cross* (2003) 493-526, at 501.

⁴ UN General Assembly (‘GA’), *Basic Principles and Guidelines on the Right to Restitution, Compensation and Rehabilitation, for Victims of Gross Violations of Human Rights and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, 16 December 2005, § 8. Principle V goes on to state that: ‘Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.’

⁵ Note that this definition largely replicates the one set out in UN GA, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN Doc. A/RES/40/34, 29 November 1985, Principle A(1), (2) and (3).

concept of victim set out in the Basic Principles does not abstractly define victims of human rights and humanitarian law violations, but seeks to define who is entitled to reparation.

Similarly, the recently adopted ‘Declaration of International Law Principles on Reparation for Victims of Armed Conflict’, prepared by International Law Association (‘ILA’), defines victims as persons who are harmed by violations of IHL.⁶ However, unlike the UN Basic Principles, which only refer to *serious* violations of IHL, this Declaration does not set such a threshold of gravity for its applicability.⁷

On the whole, the concept of victim entitled to rights under IHL is characterised by three main elements. First, a violation of international humanitarian law must have occurred. Second, the victim must have suffered harm (direct or indirect). Most importantly, for the concept of victim to acquire legal meaning (that is, to be associated with the exercising of rights), international humanitarian law poses an unconditional requirement: that the harm suffered by the victim be causally linked to a violation of the *jus in bello*.

Unfortunately, this may sometimes frustrate the search for justice of those people who are affected by an armed conflict but who have not been injured by a violation of IHL. Indeed, since IHL does not deal with the legality of the conflict, individuals cannot claim reparation for breaches of the *jus ad bellum*. Indeed, to contend that a violation of the *jus ad bellum* entails a claim to reparation would be unrealistic, since every member of the population affected by the armed conflict is potentially a victim. This approach has been adopted by certain claims commissions (such as the United Nations Compensation Commission) that have awarded compensation to individual claimants for losses or damages ensuing from violation of *jus ad bellum*, independently of whether a violation of the *jus in bello* had also occurred.⁸ Nonetheless, such an approach has not been replicated in international and domestic practice. We can recall, in this regard, a judgment of 29 November 2002 by the Dutch Supreme Court in which the judges stated that rules of IHL do not protect

⁶ ILA, *Reparation for Victims of Armed Conflicts*, Resolution 2/2010. Art. 4 provides as follows:

‘1. For the purposes of this Declaration, the term “victim” means natural or legal persons who have suffered harm as a result of a violation of the rules of international law applicable in armed conflict.

2. This provision is without prejudice to the right of other persons – in particular those in a family or civil law relationship to the victim – to submit a claim on behalf of victims provided that there is a legal interest therein. This may be the case where the victim is a minor child, incapacitated or otherwise unable to claim reparation.’

⁷ See the commentary to Art. 4, ILA, ‘Reparation for Victims of Armed Conflict’, The Hague Conference (2010), § 2.

⁸ UN Security Council, Resolution 687, UN Doc. S/Res/687, 3 April 1991, entrusted the UNCC with adjudicating claims against Iraq for ‘any direct loss, damage — including environmental damage and the depletion of natural resources — or injury to foreign governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait.’ (§ 16).

persons against stresses and tensions that are consequences of air strikes as such and do not protect persons with regard to whom the rules and norms of IHL have not been violated.⁹

The right to invoke the rules of IHL is therefore confined to those who personally were the victims of violations of IHL. This is also the case of ‘collateral damage’ resulting from lawful conducts undertaken during an armed conflict. For example, if in the course of an air strike a civilian building is accidentally destroyed while attacking a lawful military objective - provided that all the necessary precautions have been taken and that the destruction is proportional to the military advantage gained - the harm sustained by the victim does not necessarily amount to a violation of a rule of IHL. As such, from a strictly legal point of view, victims of the attack are not entitled to remedy and reparation.

This approach has been adopted, *inter alia*, by the Eritrea-Ethiopia Claims Commission, although with some exceptions. Indeed, pursuant to Article 5 of the Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea,

The mandate of the Commission is to decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party or entities owned or controlled by the other party that ... (b) result from *violations of international humanitarian law*, including the 1949 Geneva Conventions, or other violations of international law.¹⁰

As observed in Chapter I, individual victims did not have the right to bring claim before the Eritrea-Ethiopia Commission¹¹ although both states were entitled to bring claims on behalf of individuals. An analysis of the partial final awards of the Commission reveals that this body considered the unlawful character of an act as a precondition for the award of compensation. More precisely, the EECC determined that Eritrea was required to compensate Ethiopia, and *vice versa*, for harm and losses suffered by individuals as a result of violations of international humanitarian law. For instance, the Commission determined that Eritrea was required to compensate Ethiopia for violations of the *jus in bello* in respect of the violations including the intentional killings, beatings, wounding by small-arms fire, abductions, disappearances, forced labour, and conscription of Ethiopian civilians¹² or the unlawful treatment of Ethiopian

⁹ Judgment cited in L. Zegveld, ‘Remedies for Victims of International Humanitarian Law’, *supra* note no. 3, at 501-502.

¹⁰ Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, 12 December 2000, reproduced in 40 *International Legal Materials* (2001) 260-264.

¹¹ Chapter I, Section 2.2.

¹² EECC, *Final Award, Ethiopia’s Damages Claims between the Federal Democratic Republic of Ethiopia and the State of Eritrea*, 17 August 2009, § 103.

POWs;¹³ likewise, Ethiopia was required to compensate Eritrea for violations of IHL such as the mistreatment of Eritrean POWs¹⁴ and the detention of Eritrean civilians under harsh and unacceptable conditions.¹⁵

Therefore, even if not ruling on individual claims, the Commission substantially confirmed that individuals eligible for awards of compensation need to have suffered harm as a result a violation of IHL, as indicated above. In this respect, it remains doubtful whether the much criticised position taken by the Commission in its final awards, where it also granted compensation for damages resulting from the violation of the *jus ad bellum* by Eritrea,¹⁶ notwithstanding that such possibility was not explicitly foreseen in the Agreement cited above, is sound law. It is true, however, that the awards for *jus ad bellum* damages mostly related to losses suffered by the government (destruction of government warehouses and other property resulting from an Eritrean air raid or other operations by Eritrean forces,¹⁷ the expenses incurred by Ethiopia to care for the many thousands of Ethiopians internally displaced during the war)¹⁸ whereas claims concerning losses suffered by individual victims were rejected,¹⁹ thereby confirming that individuals may have a right to reparation only for violations of the *jus in bello*, and not of the *jus ad bellum*.

¹³ *Ibid.*, § 213.

¹⁴ ECCC, *Final Award, Eritrea's Damages Claims between the State of Eritrea and the Federal Democratic Republic of Ethiopia*, 17 August 2009, §§ 228-233.

¹⁵ *Ibid.*, § 376.

¹⁶ ECCC, *Final Award, Ethiopia's Damages Claims between the Federal Democratic Republic of Ethiopia and the State of Eritrea*, *supra* note no. 12, at 61-103.

¹⁷ *Ibid.*, §§ 410, 419-420.

¹⁸ *Ibid.*, §§ 470-79.

¹⁹ Examples include claims for deaths of Ethiopian POWs (*Ibid.*, § 431), which were awarded compensation for violations of the *jus in bello*, but not of the *jus ad bellum*.

3 THE CONCEPT OF VICTIM IN INTERNATIONAL HUMAN RIGHTS LAW

3.1 Preliminary Remarks

The concept of victim is referred to in many international treaties for the protection of human rights. However, most of them do not describe how this concept ought to be interpreted.²⁰ In other cases, human rights treaties presuppose the concept of victim and implicitly understand it as referring to the person whose rights have been violated. This is for example the case of Article 2(3) of the International Covenant of the Civil and Political Rights ('ICCPR') which refers to 'any person whose rights or freedoms as herein recognized are violated' as the holder of the right to remedy.²¹

Plainly, the interpretation of the concept of victim is one of the most crucial issues in the jurisprudence of human rights supervisory bodies which receive complaints of alleged violations by individuals and may, in some cases, award reparation. However, it should be noted at the outset that the concept of victim proper, understood as the person who directly suffered from the violation at issue, does not necessarily coincide with the individuals having right to *locus standi* or to claim reparation. In some systems, persons who are not entitled to the victim status may nonetheless be considered as 'injured' by the violation at issue and hence be entitled to exercise certain rights.²²

For this reason, the analysis in the following sub-sections will not be limited to the definition of victim proper but will cover all categories of injured parties who may exercise rights (to *locus standi* and to reparation) before international human rights bodies. After having defined the categories of victims under international human rights law this Chapter will then focus on the concept of harm, which is the main requirement for the concept of victim in this body of law.

²⁰ Art. 9(5) ICCPR; Art. 14(1) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT'); Art. 5(5) European Convention on Human Rights ('ECHR'); Art. 9(1) Inter-American Convention to Prevent and Punish Torture. However, some treaties are more explicit and define more clearly who is entitled to reparation. For instance, Article 16(4) of the Indigenous and Tribal Peoples Convention 1989 (No. 169) of the International Labour Organization guarantees reparation for 'peoples removed from land' and Article 16(5) of the same Convention to 'persons relocated.' Article 21(2) African Charter on Human and Peoples' Rights ('AfrCHPR') speaks of 'dispossessed people' whose wealth and natural resources have been spoilt.

²¹ See Art. 6 International Convention on the Elimination of All Forms of Racial Discrimination; Art. 2 Optional Protocol to Convention on the Elimination of all Forms of Discrimination against Women; Article 13 CAT; Article 13 and Article 34 ECHR; Definition 33 of the Rules of Procedure of the Inter-American Court of Human Rights ('IACtHR').

²² See *infra* Section 3.2.2.

3.2 Categories of Victims

Important scholarly works in victimology have conceptualised victimhood by classifying victims into three categories: primary, secondary and tertiary victims.²³ Primary victims are understood as those individuals who suffered harm as a direct consequence of the violation at issue. Secondary (or indirect) victims are generally understood as the dependants or next of kin of the direct victims (as also set out in the UN Basic Principles mentioned above). A special group of indirect victims are second-generation victims. In the context of the Holocaust, for example, special attention was given to second-generation victims and the effect the trauma suffered by their parents had on them.²⁴ Tertiary victims include all those individuals not falling in the two previous categories but who nonetheless feel victimised by the violations. The following sub-sections will analyse how these three categories have been interpreted by human rights supervisory bodies and which rights are conditioned upon each category.

3.2.1 *Direct Victims*

Most human rights treaties do not require victim status as a precondition for the exercise of rights, including access to justice and reparation. Rather, human rights supervisory bodies that have jurisdiction over individual petitions generally accept that all individuals who have been affected by a violation may bring a complaint, have legal standing in the proceedings and may have a right to reparation. Direct victims are certainly part of this group which, nonetheless, may also include persons who have been indirectly harmed by the violation.

In that respect these bodies accept that it is not necessary to show that the complainant suffered any specific prejudice or damage to exercise rights. Consequently, in certain cases the mere existence of laws or administrative acts putting an individual right at risk is sufficient to show that the complainant as a victim. Indeed, one of the essential features of the jurisprudence and practice of human rights bodies is the concept of ‘potential’ or ‘prospective’ victims or, more precisely, victims claiming a potential violation of an individual right. Essentially, a potential victim is a person who is at risk of being directly affected by a violation.

²³ R. Letschert and T. van Boven, ‘Providing Reparation in Situations of Mass Victimization. Key Challenges Involved’, in R. Letschert, R. Haveman, A-M de Brouwer and A. Pemberton (eds), *Victimological Approaches to International Crimes: Africa* (Cambridge: Intersentia, 2011) 153-184, at 161.

²⁴ See various contributions in Y. Danieli (ed.), *International Handbook of Multigenerational Legacies of Trauma* (New York: Plenum Publishers, 1998).

As a matter of fact, the concept of victim in human rights treaties has assumed vital importance, especially in cases brought by individuals complaining against legislative, administrative or judicial acts that have the potential to violate their rights. There is, indeed, a growing body of case law, albeit not uncontested,²⁵ holding that an individual may claim to be a victim when the law or act has not yet been applied to him or her but will be applied in the near future.²⁶ According to established case law, for example, a person's expulsion or extradition may give rise to an issue under Article 3 of the ECHR where there are serious reasons to believe that in the receiving state he or she will be subjected to treatment contrary to that provision.²⁷

In this respect, the Inter-American Court of Human Rights represents an exception, in that it only alleged victims or their representatives have *locus standi in judicio*.²⁸ However, it must be observed that the Court has progressively adopted a broad interpretation of the concept of victim and, consequently, of those individuals having right to participation in the proceedings. Even though the right to participate in all the stages of the proceedings before the Court is not granted to indirect victims the Court has recognised that for certain violations victims' next of kin may have *locus standi*.

This expanded concept developed first in cases of disappearance²⁹ and later in cases of arbitrary killings.³⁰ In *Blake v. Guatemala*, a case involving the disappearance of two American journalists, the Court held that the disappearance of the journalists 'generate[d] suffering and anguish [to their parents], in addition to a sense of insecurity, frustration and impotence in the face of the public authorities' failure to investigate.'³¹ The relatives of Mr. Blake were also considered autonomous victims of a violation of Article 8 of the ACHR as a

²⁵ For example, in *Ruby Smith v. UK*, a Gypsy claimed to be affected by laws that made it a criminal offence for Gypsies to camp in certain areas. The European Commission of Human Rights ('EComHR') declared the application inadmissible by holding that, while in principle Article 8 aims at protecting the traditional lifestyle of a minority, the applicant failed to establish that 'the measure complained of has a real and direct effect on his or her pursuit of that lifestyle.' EComHR, *Ruby Smith v. UK* (App. No. 18401/91), Decision on Admissibility, 6 May 1993.

²⁶ One of the first complaints of this sort was raised in a complaint against Denmark. The two applicants complained that, by making sex education compulsory in public schools, the Danish government had violated the parents' right to educate their children in conformity with their religious and philosophical convictions, pursuant to Article 2 of the 1st Protocol of the Convention. The Commission declared the complaints admissible, although the legislation had not yet been applied to the particular applicants or their daughter. EComHR, *Kjeldsen et al. v. Denmark* (App. Nos. 5095/71, 5920/72, 5926/72), Decision on Admissibility, 21 March 1975.

²⁷ E.g., ECtHR, *Soering v. United Kingdom* (App. No 14038/88), Judgment (Merits and Just Satisfaction), 7 July 1989.

²⁸ Art. 25 IACtHR Rules of Procedure.

²⁹ In *Castillo Páez v. Peru*, the IACtHR considered the next of kin as the victim of a violation of the right to judicial guarantees; see *Castillo Páez v. Peru*, Judgment (Merits), 3 November 1997, §§ 80-84.

³⁰ IACtHR, *Villagrán Morales et al v. Guatemala*, Judgment (Merits), 19 November 1999, §§ 172-177.

³¹ IACtHR, *Blake v. Guatemala*, Judgment (Merits), 24 January 1998, §§ 114-116.

result of an undue delay in the administration of justice which violated their right to have the perpetrators of the crime against their relative investigated and prosecuted and to be compensated accordingly for the harm suffered.³²

On the other hand, it is noteworthy that in relation to cases of arbitrary detention or inhuman treatment victims' next of kin have been recognised simply as injured parties entitled to claim reparations (as will be illustrated in the next sub-section) but not to *locus standi in judicio*. The rationale underpinning this distinction between violations may lie in the idea that whenever direct victims of a violation survive the violation itself (such as, most often, in cases of arbitrary detention or inhuman treatment), they have the right to access to justice on their own, while their next of kin may be entitled to reparations as injured parties. Arguably, if the direct victim is able to act as a party in the litigation before the Court there is no real motive for allowing his or her next of kin to take part in the proceedings. On the contrary, when the direct victim did not survive the violation their next of kin may be allowed to exercise their right of *locus standi* (in a way, also on behalf of direct victims), separately from obtaining reparations as victims for the harm suffered as a result of the primary victimisation inflicted on their relatives.

3.2.2 *Indirect Victims*

As mentioned above, human rights supervisory bodies generally permit indirect victims to exercise the same rights as direct victims, adopting a broad understanding of the concept of victim. This is a crucial issue especially in cases of gross human rights violations where the group of people affected may conceivably include a large number of persons other than the direct victims. As such, construing an appropriate concept of victim becomes essential to ensure meaningful protection of those affected by violations and effective recognition of their rights. Accordingly, these bodies have often allowed indirect victims to exercise rights even if they did not suffer the violation of an individual right.

As far back as 1970 the former European Commission on Human Rights defined the term 'victim' as including 'not only the direct victim or victims of the alleged violation, but also any person who would indirectly suffer prejudice as a result of such violation or who would have a valid personal interest in securing the cessation of such violation.'³³ The European Court recognises that a right of complaint, pursuant to Article 34 of the Convention,

³² *Ibid.*, § 97.

³³ EComHR, *X v. Federal Republic of Germany* (App. No. 4185/69), Decision, 13 July 1970.

and a right to reparation, in the sense of Article 41, applies to indirect victims.³⁴ Indirect victims have also been recognised *locus standi in judicio* and the right to reparation before the African Commission of Human and Peoples' Rights ('AfrComHPR'). For instance, in the *Mauritania* case, the Commission held that 'compensatory benefit' should be paid to the widows and beneficiaries of victims of disappearances and killings.³⁵

In general terms, indirect victims are those individuals who suffered harm as a result of a link with the direct victim. The most obvious examples of indirect victims are family members and dependants of direct victims such as the spouse of a person who has been disappeared. Who may be considered an indirect victim may vary considerably in relation to the cultural context where the violation occurred. Where in western societies indirect victims are mostly limited to members of the nuclear family a broader family conception may be applied elsewhere.³⁶ Taking into account the developments in customary international law and the case-law both at the international and domestic level, the ILA Committee on Reparation for Victims of Armed Conflict observed that:

It is the suffering of harm which qualifies these third persons as victims it sees no compelling reason to a priori restrict this group of third persons to members of the 'immediate family', 'dependants', or 'persons who have suffered harm in intervening to assist victims in distress or to prevent victimization' as done in the Basic Principles.³⁷

In order to illustrate the connection between the harm suffered and the violation the Committee further suggested that two considerations should guide the decision: [F]irst the need to exclude harm that is too remote (such as e.g. unrelated persons far removed from the conflict who are emotionally affected by news of the suffering); and second, the need not to unduly limit the number of victims. The two aspects should be balanced carefully.^{37bis}

Likewise, the 2008 UN Report on Rule-of-Law Tools for Post-Conflict States argues that setting out a high threshold would leave out many victims:

³⁴ See e.g., ECtHR, *Çakici v Turkey* (App.No. 23657/94), Judgment (Merits and Just Satisfaction), 8 July 1999, §§ 123-133.

³⁵ AfrComHPR, *Malawi African Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme v. Mauritania* (Comm. Nos. 54/91-61/91-96/93-98/93-164/97-196/97-210/98), 11 May 2000, Recommendations.

³⁶ For instance, in the *Aloeboetoe* case, the IACtHR recognised multiple wives as being entitled to compensation. IACtHR, *Aloeboetoe et al. v. Suriname*, Judgment (Reparations), 10 September 1993, §§ 17, 66 and 97-98.

³⁷ ILA, 'Reparation for Victims of Armed Conflict', The Hague Conference (2010), at 10.

^{37bis} *Ibid.*, at 11.

The requirements for qualifying as a beneficiary should be sensitive not just to the needs of victims ... , but also to their possibilities. The more demanding the evidentiary requirements, the more false claims will be excluded; but so will perfectly legitimate claims, preventing the programme from achieving completeness.³⁸

In cases of gross human rights violations human rights supervisory bodies have also found that indirect victims may themselves be considered victims of a violation of individual rights. For instance the Human Rights Committee in the *Almeida de Quinteros* case found that the mother of a disappeared person was a victim herself of torture or cruel, inhuman or degrading treatment prohibited by in Article 7 of the ICCPR because of ‘the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts’.³⁹ Similarly, the Committee has held that other gross human rights violations, like unlawful killings, cause suffering to both direct and indirect victims.⁴⁰

In the same vein, since the judgment in the *Kurt v. Turkey* case, the European Court of Human Rights has recognised that the relatives of a disappeared person can be considered victims of the prohibition of torture and inhuman or degrading treatment guaranteed in Article 3 of the ECHR, provided that the harm they claim to have suffered is distinct from the emotional distress inevitably caused to a relative of a victim of gross human rights violations.⁴¹ In order to evaluate the suffering of indirect victims the Court has taken into account criteria such as the proximity of the family tie, the extent to which the family member witnessed the events in question and the involvement of the family members in the attempts to obtain information about the alleged violations.⁴² Furthermore, the Court considers that

³⁸ Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Reparations* (New York and Geneva: United Nations, 2008), at 18.

³⁹ HRC: *Almeida de Quinteros et al v. Uruguay* (Comm. No. 107/1981), UN Doc. CCPR/C/19/D/107/1981, 21 July 1983, §§14, 16; see also *Laureano v. Peru* (Comm. No. 540/1993), UN Doc. CCPR/C/56/D/540/1993, 25 March 1996, § 10; *Jegatheeswara Sarma v. Sri Lanka* (Comm. No. 950/2000), UN Doc. CCPR/C/78/D/950/2000, 16 July 2003, § 11; *José Antonio Coronel et al. v Colombia* (Comm. No. 778/1997), UN Doc. CCPR/C/76/D/778/1997, 24 October 2002, § 10. Similarly, the Working Group on Enforced and Involuntary Disappearances has stated that ‘in addition to the victims who survived the disappearance, their families are also entitled to compensation for the suffering during the time of the disappearance, and in the event of the death of the victim, his or her dependants are entitled to compensation’. Working Group on Enforced and Involuntary Disappearances, *General Comment on Article 19 of the Declaration on the Protection of All Persons from Enforced Disappearance*, UN Doc. E/CN.4/1998/43, 12 January 1998, § 72.

⁴⁰ HRC, *Suárez de Guerrero v. Colombia* (Comm. No. R.11/45), UN Doc. CCPR/C/15/D/45/1979, 31 March 1982, § 15; *John Khemraadi Baboeram et al. v Suriname* (Comm. Nos. 146/1983 and 148 to 154/1983), UN Doc. CCPR/C/24/D/146/1983, 4 April 1985, § 16.

⁴¹ ECtHR, *Kurt v. Turkey* (App. No. 23164/09), Judgment (Merits and Just Satisfaction), 25 May 1998, §§ 71-76.

⁴² For a critical review of the criteria used by the ECtHR to identify indirect victims in cases of serious human rights violations, see T. Feldman, ‘Indirect Victims, Direct Injury: Recognizing Relatives As Victims Under The European Human Rights System’, 1 *European Human Rights Law Review* (2009) 50-69.

relatives may claim to be a direct victim of the authorities' negligent conduct when the alleged violation is brought to their attention.⁴³

Plainly, as stated above, no difference exists (at least procedurally) between being recognised as the direct or indirect victim before these bodies. As such, the pronouncements mentioned above may eventually influence the award of reparation but not the role that individuals may play in the proceedings. Notably, in *Aksoy v. Turkey* the Court awarded just satisfaction to the father of the victim, not only for the suffering of his son but also on account of his own suffering, even though it did not consider him as a victim of any violation of Conventional rights.⁴⁴ Similarly, in *Çakici v. Turkey* the Court held that, although the claimant, a relative of a disappeared person, was not himself victim of a violation of the Convention, 'he was undoubtedly affected by the violations found by the Court and may be regarded as an "injured party" for the purposes of Article 41.' Moreover, the Court '[h]aving regard to the gravity of the violations and to equitable considerations', awarded non-pecuniary damages to the applicant.⁴⁵

Conversely, a difference remains in the system of the Inter-American Court of Human Rights where indirect victims, defined as 'injured parties', may be entitled to reparation under Article 63 of the ACHR but not, as observed above, to *locus standi in judicio*. The IACtHR laid down the foundations for interpreting the concept of 'injured party' in *Velásquez Rodríguez v. Honduras*⁴⁶ where the direct victim's wife and children were recognised as injured parties for the purposes of reparation. The Court did not explicitly set out the principles for the identification of injured parties; nevertheless, a careful reading of the judgment on reparations reveals that the concept of injured party adopted by the Court has two elements: (i) generally speaking, it includes those persons who are entitled to receive reparation from the Court, pursuant to Article 63(1) of ACHR; and (ii) more specifically, the concept refers both to victims and to those people who are not victims of the violation, but nonetheless suffered harm as a result of the violation on others, and are as such entitled to reparations (such as Manfredo Rodríguez's next of kin).⁴⁷

The Court has also established that a 'presumption *juris tantum*' applies to the parents and the children of the direct victims meaning that they must always be considered indirect

⁴³ ECtHR, *Çakici v. Turkey*, *supra* note no. 34, § 98.

⁴⁴ ECtHR, *Aksoy v. Turkey* (App. No. 21987/93), Judgment (Merits and Just Satisfaction), 18 December 1996, § 113.

⁴⁵ *Çakici v. Turkey*, *supra* note no. 34, § 130; *Aktaş v. Turkey* (App. No. 24351/94), Judgment (Merits and Just Satisfaction), 24 April 2003, § 364.

⁴⁶ See IACtHR, *Velásquez Rodríguez v. Honduras*, Judgment (Reparation and Costs), 21 July 1989.

⁴⁷ *Ibid.*, § 53.

victims. In this respect the Court has held that ‘it can be presumed that the parents have suffered morally as a result of the cruel death of their offspring, for it is essentially human for all persons to feel pain at the torment of their child.’⁴⁸ Over the years, the concept of injured party has been interpreted broadly as the Court has deliberately avoided defining the term itself. As a result of this indeterminacy the Court has afforded itself considerable room for manoeuvre and been able to extend its protection to all those persons who may potentially suffer harm as a result of a gross human rights violations who are otherwise excluded from the category of victims.⁴⁹

3.2.3 *Collective Victims*

As mentioned in the introduction to this Chapter, in situations where gross violations of human rights or international crimes have occurred, a large number of individuals, besides direct victims and their relatives and dependants, may feel victimised by these violations. These individuals are known in victimology as ‘tertiary victims’⁵⁰ and may potentially include the whole population of a society where mass atrocities have taken place. Mass victimisation may pose great challenges as to how to adequately address harm suffered by large numbers of people. In this respect, it may be helpful to resort to collective redress and collective forms of reparation for groups of victims or victimised communities.

The concept of collective victims may include groups of individuals linked by bonds such as ethnicity, language or religion that have been victimized.⁵¹ Collective victims can also include a group of individuals, not linked by any bond, who have suffered a common violation such as in the case of gross human rights violations

The right of groups of victims or victimised communities to present collective claims and to receive collective reparation has been included in a number of international legal documents. For instance, the Basic Principles mentioned above refer the right of groups of victims to have access to justice and to reparation in addition to the individual’s right to reparation. The Preamble of the Principles explicitly affirms that ‘contemporary forms of victimisation, while essentially directed against persons, may nevertheless also be directed

⁴⁸ IACtHR, *Aloeboetoe et al. v. Suriname*, *supra* note no. 36, § 76. See contra, *La Cantuta v. Peru*, Judgment (Merits, Reparations, and Costs), 29 November 2006, §§ 216-220; see also *Concurring Opinion in the Interpretation of the Judgment in the case of La Cantuta v. Peru by Judge Cançado Trinidad*, §§ 44, 46.

⁴⁹ As Judge Cançado Trinidad pointed out: ‘The Court arrived at an understanding of the term ‘injured party’ as a more ample concept than that of victim’. *Concurring Opinion of Judge Cançado Trinidad*, *supra* note no. 48, § 61.

⁵⁰ R. Letschert and T. van Boven, ‘Providing Reparation in Situations of Mass Victimization. Key Challenges Involved’, *supra* note no. 23, at 162.

⁵¹ M.C. Bassiouni, ‘The Protection of “Collective Victims” in International Law’, in *Id.* (ed.), *International Protection of Victims*, *supra* note no. 1, 181-198.

against groups of persons who are targeted collectively.’⁵² Similarly, the *Updated Set of Principle to Protect and Promote Human Rights through Action to Combat Impunity* (‘Principles on Impunity’) refer to individuals and communities to whom reparations may be addressed.⁵³

This having been said, neither the UN Basic Principles nor the Principles on Impunity specify the meaning and the form of collective reparation. In this respect, the jurisprudence of the Inter-American Court of Human Rights which, in a number of cases, has dealt with the issue of collective reparation proves instructive. For instance, in *Moiwana v. Suriname*, the Court held that:

Given that the victims of the present case are members of the N’duka culture, this Tribunal considers that the individual reparations to be awarded must be supplemented by communal measures; said reparations will be granted to the community as a whole.⁵⁴

Furthermore, the Court has also established that in cases of massacres or widespread disappearances it is competent to adopt a flexible approach to the evaluation of the status of the injured party which may result in reparations being made to communities rather than to specific individuals. For instance, in the *Massacre of Plan de Sánchez v. Guatemala* case the Court held that the victims of the violations were not only those persons listed by the Commission in its application, but also ‘those that may be subsequently identified’⁵⁵ and reserved the right to determine other forms of reparation in favour of all the members of the community affected by the facts of the case.

Plainly, the forms of reparations awarded to collective victims do not, by definition, aim at repairing individual harm. Collective forms of reparation awarded to victimised groups or communities include symbolic reparations such as public apology, the accountability of the offenders and setting up of memorials, as will be discussed in Chapter III.

⁵² UN Basic Principles, *supra* note no. 4, Preamble.

⁵³ Commission on Human Rights, *Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, Diane Orentlicher; *Addendum: Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, Principle 32.

⁵⁴ IACtHR, *Moiwana Community v. Suriname*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 15 June 2005, § 194.

⁵⁵ IACtHR, *Plan de Sánchez Massacre v. Guatemala*, Judgment (Merits), 29 April 2004, §§ 47-48; *Plan de Sánchez Massacre v. Guatemala*, Judgment (Reparations and Costs), 19 November 2004, §§ 62, 86; see also *Moiwana v. Suriname*, *supra* note no. 54, § 178; *Saramaka People v. Suriname*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 28 November 2007, § 189.

3.3 The Concept of Harm

The idea of harm is central to the concept of victim. Indeed, as illustrated in the preceding sections, the exercise of rights before international human rights bodies requires that individuals have suffered harm either directly, indirectly or collectively. It is generally agreed that any violation of this body of law entails harm for the person who suffered the violation; in other words, the ‘substantial impairment of their [the victims] fundamental rights’⁵⁶ is considered a category of harm *per se*, aside from material, physical or moral damage. This is consistent with the obligation to provide reparation arising out of the breach of an international obligation, as discussed in Chapter I. Indeed, state responsibility arises directly from a breach of international law, such as a breach of an obligation under international human rights law, and not from the consequences of such a breach.⁵⁷ Nonetheless, the question of harm remains critical for the entitlement and the modalities of reparation.

In international human rights law, like in many domestic systems, two broad categories of harm can be distinguished, namely pecuniary and non-pecuniary harm. The expression ‘pecuniary harm’ is generally used to refer to recoverable economic harm while ‘non-pecuniary harm’ refers to other forms of recoverable harm that are not monetary in character, such as various types of physical and psychological harm.

3.3.1 Pecuniary Harm

Many human rights violations, particularly gross human rights violations amounting to international crimes, may involve the deprivation or the destruction of an individual’s property. There is a considerable body of jurisprudence in international human rights supervisory bodies concerning reparation for damage or loss of property. Two main elements characterise this jurisprudence. First, the notion of property is usually interpreted in a broad manner. For example, in the case of *Ituango Massacres v. Colombia* the Inter-American Court of Human Rights stated that it had:

[D]eveloped a broad notion of property, which encompasses, among other matters, the use and enjoyment of ‘possessions’, defined as appropriable material objects, as well as any right that can form part of a person’s

⁵⁶ *UN Basic Principles*, *supra* note no. 4, Principle 8

⁵⁷ International Law Commission (‘ILC’) *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries* (‘ILC Draft Articles’), UN Doc. A/Res/56/83, 22 January 2002, Art. 1.

patrimony. This notion includes all movables and immovables, corporeal and incorporeal elements, and any other immaterial object that may be of value.⁵⁸

Second, international human rights bodies have recognised that, in certain contexts, it is not necessary for victims to prove they have official legal titles to a piece of land to claim reparation for its loss. Depending on local customs, in some cases possession and occupation have been considered a sufficient basis for a claim to reparation. The Inter-American Court of Human Rights has established that:

[I]n the case of indigenous communities who have occupied their ancestral lands in accordance with customary practices – yet who lack real title to the property – mere possession of the land should suffice to obtain official recognition of their communal ownership.⁵⁹

The practice of the European Court of Human Rights indicates that this approach is not limited to indigenous populations but may also be applied in cases where there is no formal practice of registering property.⁶⁰

In case of gross violations of human rights pecuniary harm may also consist of the loss of support as a result of the death or injury of a victim for the spouse, dependants or family members of the victim. The pronouncements of human rights bodies indicate that the concept of loss of support is not limited to financial support but may also include other contributions that the victim would have made, such as raising the children.⁶¹ Moreover, a flexible approach has been adopted with regard to the relationship between the victim and the person claiming reparation. Notably, in *Aloeboetoe v. Suriname* the Inter-American Court established a three-tiered test: (i) reparations have to be based on payments actually made by the victim to the claimant, (ii) that from the relationship between the victim and the claimant it is reasonable to assume that the payments would have continued if the victim had survived, and (iii) the claimant must experience a financial need which was met by the contributions of the victim.⁶² Finally, other forms of pecuniary harm that have been recognised as heads of damages by

⁵⁸ IACtHR, *Ituango Massacres v. Colombia*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 1 July 2006, § 174.

⁵⁹ IACtHR, *Moiwana v. Suriname*, *supra* note no. 54, § 131; see also *Mayagna (Sumo) Awas Tigni Community v. Nicaragua*, Judgment (Merits, Reparations, and Costs), 31 August 2001, § 151; *Yakye Axa Indigenous Community v. Paraguay*, Judgment (Merits, Reparations, and Costs), 17 June 2005, § 137.

⁶⁰ ECtHR, *Akdivar and others v. Turkey* (App. No. 21893/93), Judgment (Just Satisfaction), 1 April 1998, §§ 16-26; *Ayder and others v. Turkey* (App. No. 23656/94), Judgment (Merits and Just Satisfaction), 8 January 2004, § 143.

⁶¹ See e.g., ECtHR: *Aktas v. Turkey*, *supra* note no. 45, §§ 349-355; IACtHR: *Rochela Massacre v. Colombia*, Judgment (Merits, Reparations and Costs), 11 May 2007, § 262.

⁶² *Aloeboetoe v. Suriname*, *supra* note no. 36, § 68.

human rights supervisory bodies include loss of earnings, where it is sufficiently clearly established,⁶³ medical funeral and various expenses.⁶⁴

3.3.2 *Non Pecuniary Harm*

Many different types of injuries fall within the category of non-pecuniary harm including death, physical and psychological harm and emotional distress. Although these forms of harm are difficult to assess in economic terms, this does not mean that they are not repairable. This was made clear in the *Lusitania* arbitration, where the Commission stated that an injured person is:

[U]nder the rules of international law, entitled to be compensated for an injury resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position, or injury to his credit or reputation.⁶⁵

The Commission further added that:

[T]he mere fact that [these harms] are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated therefore as compensatory damages.⁶⁶

As will be argued in Chapter III, special forms of reparation other than monetary compensation are associated with this type of harm, especially when it occurs as a consequence of a gross violation.

In cases of death, the European and Inter-American Court of Human Rights have held that the families of victims may claim both their own non-pecuniary injury, such as emotional suffering, as well as that of their loved ones.⁶⁷ Human rights bodies have also regularly awarded reparation for physical injury arising from violations such as acts of torture.⁶⁸ In the case of mental injury, international human rights bodies usually distinguish between

⁶³ See e.g., ECtHR, *Campbell and Cosans v. United Kingdom* (App. Nos 7511/76; 7743/76), Judgment (Merits and Just Satisfaction), 22 March 1983, § 26; IACtHR, *Godínez-Cruz v. Honduras*, Judgment (Reparations and Costs), 21 July 1989, §§ 44-46.

⁶⁴ See e.g. ECtHR, *Aksoy v. Turkey*, *supra* note no. 44, §§ 111-113; IACtHR, *Miguel Castro-Castro Prison v. Peru*, Judgment (Merits, Reparations, and Costs), 25 November 2006, § 428.

⁶⁵ *Opinion in the Lusitania Cases*, 1 November 1923, *Reports of International Arbitral Awards*, vol. VII, 32-44, at 40.

⁶⁶ *Ibid.*

⁶⁷ See e.g. ECtHR, *Salman v. Turkey* (App. No. 21986/93), Judgment (Merits and Just Satisfaction), 27 June 2000, § 140; IACtHR, *Aloeboetoe v. Suriname*, *supra* note no. 36, § 62.

⁶⁸ See e.g. ECtHR, *Z. and others v. United Kingdom* (App. No. 29392/95), 10 May 2001, §§ 119-127; IACtHR, *Miguel Castro-Castro Prison v. Peru*, *supra* note no. 64, §§ 430-433; HRC, *Hugo Rodríguez v. Uruguay* (Comm. No. 322/188), UN Doc. CCPR/C/51/D/322/1988, 19 July 1994, § 14.

psychiatric injury and other less serious forms of emotional distress not amounting to a medical condition. While mental distress is often presumed, especially in respect of serious violations of human rights suffered by the applicant or his relatives,⁶⁹ medical evidence is required as proof of the existence of psychiatric injury.⁷⁰

Finally, non-pecuniary harm may include the loss of social, educational or familial opportunities. For example, in *Campbell and Cosans v. United Kingdom*, the European Court found that the violation in question had deprived the victim of ‘some opportunity to develop his intellectual potential.’⁷¹ Similarly, in *Thlimmenos v. Greece*, the Court held that the violation suffered by the individual had damaged ‘the applicant’s access to a profession, which is a central element for the shaping of one’s life plans.’⁷²

As observed in Chapter I, the Inter-American Court has certainly been the most proactive body in ordering reparation for loss of non-pecuniary opportunities, recognising damage to a victim’s potential for self-realisation (*proyecto de vida*). In the case of *Loayza Tamayo v. Peru*, the Court explained that the damage to the victim’s *proyecto de vida* is concerned with the inability of the victim to realise ‘full self-actualisation’⁷³ and is ‘akin to the concept of personal fulfilment, which in turn is based on the options that an individual may have for leading his life and achieving the goal that he sets for himself’.⁷⁴ In a concurring opinion, Judges Cançado-Trindade and Abreu-Burelli further stated that reparation should recognise that an individual, rather than being merely an agent of ‘economic production’⁷⁵ has ‘needs and aspirations which transcend...purely economic measures or projections.’⁷⁶ As will be further explored in Chapter III, although the Court has recognised this form of harm in a number of cases, it has been rather cautious in awarding monetary reparation, holding instead that this type of harm can be repaired through measures of satisfaction.⁷⁷

⁶⁹ See e.g., ECtHR, *Öneryildiz v. Turkey* (App. No. 48939/99), Judgment (Merits and Just Satisfaction), 30 November 2004, §§ 164 and 171; IACtHR, *Maritza Urrutia v. Guatemala*, Judgment (Merits, Reparations, and Costs), 27 November 2003, § 169. See *supra* Section 3.2.2.

⁷⁰ E.g., *Z. and others v. United Kingdom*, *supra* note no. 68, §§ 128-131.

⁷¹ *Campbell and Cosans v. United Kingdom*, *supra* note no. 63, § 26.

⁷² ECtHR, *Thlimmenos v. Greece* (App. No. 34369/97), Judgment (Merits and Just Satisfaction), 6 April 2000, § 70.

⁷³ IACtHR, *Loayza Tamayo v. Peru*, Judgment (Reparations and Costs), 27 November 1998, §§ 147-148.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*, Joint Concurring Opinions of Judges Cançado-Trindade and Abreu-Burelli, §§ 8-9.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*, §§ 153-154; see also *González et al. v. Mexico*, Judgment (Preliminary Objections, Merits, Reparations, and Costs), 16 November 2009, § 589.

4 THE CONCEPT OF VICTIM IN INTERNATIONAL CRIMINAL LAW

4.1 From Direct Target to Harmed Person

Due to the nature of crimes under the jurisdiction of international criminal tribunals, a large number of people may potentially be eligible for victim status. As such, the identification of a reasoned definition of who can be considered a victim becomes a crucial issue, especially when victim status is associated with an enhanced procedural position. In such cases a broad definition of the concept of victim may have a profound impact on proceedings, affecting the right of victims to meaningful participation and impairing the right of the accused to a fair and expeditious trial. More generally, allowing a large group of victims to exercise participatory rights risks creating a backlog in the caseload of the court, undermining the ability of the competent tribunal to efficiently implement its mandate.⁷⁸

In this respect it is interesting to observe that the process of gradual empowerment of victims before international criminal tribunals has nonetheless been accompanied by the emergence of a progressively broader definition of victim. Indeed, the International Criminal Tribunal for the former Yugoslavia ('ICTY') and the International Criminal Tribunal for Rwanda ('ICTR'), which did not grant victims any right (for instance, to participation in the proceedings and to reparation), adopted a definition of victim which strictly focuses on the link between the crime and the person directly affected by it. Rule 2 of the ICTY Rules of Procedure and Evidence ('RPE') defines victims as persons 'against whom a crime over which the Tribunal has jurisdiction has allegedly been committed.' Arguably, pursuant to this definition, only the direct targets of a crime qualify as victims.⁷⁹

The adoption of a narrow definition of victim was not, as it may be expected, the result of concerns of efficiency or fairness to the accused.⁸⁰ Since victims were not entitled to exercise rights before the Tribunals the adoption of a limited definition was not in fact aimed at reducing the number of victims having access to the courts. Rather, the motivation for the

⁷⁸ See C.P. Trumbull IV, 'The Victims of Victim Participation in International Criminal Proceedings', 29 *Michigan Journal of International Law* (2008) 777-826, at 811-819; C. Chung, 'Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?', 6 *Northwestern Journal of Human Rights* (2008) 459-545.

⁷⁹ D. Donat-Cattin, 'Article 68: Protection of Victims and Witnesses and their Participation in the Proceedings', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Note, Article by Article*, 2nd ed. (München: Beck; Portland, Oregon: Hart; Baden-Baden: Nomos, 2008) 1275-1300, at 1287.

⁸⁰ In this respect, it has been observed that 'there does not seem to be any evidence that such a thought has guided the drafters of the Statutes of the ad hoc Tribunals'. S. Zappalà, 'The Rights of Victims v. the Rights of the Accused', 8 *Journal of International Criminal Justice* ('JICJ') (2010) 137-164, at 138.

adoption of such a narrow definition has to be found in the fact that in the early nineties, when the governing rules of the ad hoc Tribunals were adopted, victims' concerns were not considered as part of the mandate of international criminal justice.⁸¹ Moreover, it is submitted that awareness that persons other than the direct target of crimes may also bear the consequences of primary victimisation was not as widely recognised as it is today, at least in this body of law.

Many criticisms have nonetheless been levelled against the ad hoc Tribunals which have been accused of exploiting victims, allowing them to interact with the courts only as witnesses and failing to address their real concerns.⁸² Awareness of such criticisms was inevitably reflected in the new system of the International Criminal Court ('ICC'). As will be thoroughly examined in Chapter VI, the ICC introduced an unprecedented procedure allowing victims to participate in their own right and to claim reparation for the harm suffered. Apart from the adoption of a groundbreaking victim participation and reparation scheme, the ICC sets out a very broad concept of victim, defined as:

(a) (N)atural persons who suffered harm as a result of a commission of any crime within the jurisdiction of the Court, and (b) organizations or institutions that have sustained direct harm to any of their property, which is dedicated to religion, education, art, or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.⁸³

Legal scholars and human rights activists have welcomed this formulation as providing the first international definition of victims centred on the concept of harm.⁸⁴ In fact, this formulation largely replicates a definition which was previously set out in the UN Declaration of 1985⁸⁵ and, by focusing on the concept of harm, follows in the jurisprudence of human

⁸¹ C. Jorda and J. de Hemptinne, 'The Status and the Role of Victims', in A. Cassese, P. Gaeta, and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 2 (Oxford; New York: Oxford University Press, 2002) 1387-1419, at 1389.

⁸² See e.g., M-B. Dembour, E. Haslam, 'Silencing Hearings? Victim-Witnesses at War Crime Trials', 15 *European Journal of International Law* ('EJIL') (2004) 151-177; L. Walley, 'Victimes et témoins de crimes internationaux: du droit à une protection au droit à la parole', 84 *Revue Internationale de la Croix-Rouge* (2002) 51-77.

⁸³ The ICC victim definition does not make a distinction between individual and collective victims. Nonetheless, it has been observed that Rule 97(1) of the ICC Rules of Procedure and Evidence ('RPE') provides that the Court can award reparations on collective basis; however, this might be seen as an introduction of certain forms of reparation, rather than as recognition of a category of victim. See M. Heikkilä, *International Criminal Tribunals and Victims of Crime: A Study of the Status of Victims before International Criminal Tribunals and of Factors affecting this Status* (Turku, Åbo: Institute for Human Rights, Åbo Akademi University, 2004), at 17-18.

⁸⁴ D. Donat-Cattin, 'Article 68: Protection of Victims and Witnesses and their Participation in the Proceedings', in O. Triffterer (ed.), *supra* note no. 79, at 1287.

⁸⁵ See *supra* note no. 5, § 1. Notably, this definition did not include legal persons, although it is generally agreed that it should be interpreted as doing so, especially when legal entities represents collective natural persons that are ultimately victimized. See L.L. Lamborn, 'The United Nations Declaration on Victims: The Scope of Coverage', in M.C. Bassiouni (ed.), *International Protection of Victims*, *supra* note no. 1, 105-126.

rights courts' footsteps. As with the definition of victim that emerged under IHL and IHRL the ICC definition sets out a three-tiered test for applicants to be granted victim status: (i) there has been a violation of the law (an international crime); (ii) the applicant must have suffered harm; and (iii) the harm suffered by the victim is causally linked to the crime. The ICC definition specifies that the term 'victim' may also include organisations or institutions that have been directly harmed. In this respect, the definition is more expansive or at least more precise than the 1985 Declaration that generally speaks of 'persons'. Some delegations had doubts about the inclusion of legal persons, particularly corporations.⁸⁶ However, the inclusion of legal entities in the definition finds its legal basis in Article 8 of the Statute, which mentions certain objects as forbidden targets for military operations.⁸⁷ It is therefore necessary to consider the owners of these objects as victims.⁸⁸

It may be observed that at present the ICC definition certainly reflects the consensus of the international community regarding the concept of victim under international criminal law. This is so for two main reasons. The first is that this definition was adopted as the result of a long and much debated negotiation between delegations belonging to very different legal traditions.⁸⁹ Furthermore, this definition served as a model for two international (hybrid) criminal tribunals, which have been established some years after the ICC, the Extraordinary Chambers in the Courts of Cambodia ('ECCC') and the Special Tribunal for Lebanon ('STL') where victims have been similarly granted broad procedural rights. The ECCC Internal Rules ('IR') define victim as 'a natural person or legal entity that has suffered harm as a result of the commission of any crime within the jurisdiction of the ECCC.'⁹⁰ Similarly, Rule 2 of the STL RPE focuses on the link between the harm suffered by the victim and the crime causing it, although it explicitly excludes legal entities, defining victim as '[a] natural person who has suffered physical, material, or mental harm as a direct result of an attack within the Tribunal's jurisdiction.'

⁸⁶ B. Timm, 'The Legal Position of Victims in the Rules of Procedure and Evidence', in H. Fisher, C. Kress and S. Rolf Lüder (eds), *International and National Prosecution of Crimes under International Law: Current Developments* (Berlin: Berlin Verlag, 2001) 289-308, at 291.

⁸⁷ These objects include 'buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected' (Arts. 8(2)(b)(ix) and 8(2)(e)(iv)) ICCSt., 'installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations' (Arts. 8(2)(b)(iii) and 8(2)(e)(iii)), and 'buildings, material, medical units and transport using the distinctive emblem of the Geneva Convention' (Arts. 8(2)(b)(xxiv) and 8(2)(e)(ii) ICCSt.).

⁸⁸ E. Baumgartner, 'Aspects of Victim Participation in the Proceedings of the International Criminal Court', 90 *International Review of the Red Cross* (2008) 409-440, at 420.

⁸⁹ S.A. Fernández de Gurmendi, 'Definition of Victims and General Principle', in R.S. Lee (ed.) *The International Criminal Court: Elements of Crime and Rules of Procedure* (Ardsley, NY: Transnational Publishers, 2001) 427-434, at 429.

⁹⁰ Glossary, ECCC IR.

The wording used by these rules potentially identifies a large number of victims. Contrary to the definition set out by the ad hoc Tribunals the definitions of victim adopted by recent international criminal tribunals do not require applicants to show that they have been targeted by the crime at issue; rather, it is sufficient that they suffered harm as a result of the crime. Moreover, the governing rules of these courts do not define the constitutive elements of the concept of victim. In particular, the interpretation of the concept of harm and the legal concept of causal link between the harm suffered by the victim and an international crime are left to the judges' discretion.⁹¹

In the following sub-sections, I will analyse how the ICC, ECCC, and STL have interpreted the constitutive elements of the definition of the victim. Subsequently, I will examine how the concept of victim has been applied in order to identify victims entitled to the right to participation (the concept of victim-participant) and those entitled to the right of reparation (the concept of victim entitled to reparation).

4.2 The Constitutive Elements of the Concept of Victim under International Criminal Law

4.2.1 *Direct and Indirect Victims*

As indicated in the previous section, recently established international and internationalized criminal tribunals have adopted a broad concept of victim which is not limited to the direct targets of an international crime, but rather include all persons who have suffered harm as a result of an international crime. As such, it may be argued that the concept of victim under international criminal law includes both direct and indirect victims.

As noted above, however, Rule 85 of the ICC RPE makes a distinction between natural persons (Rule 85(a)) and legal persons (Rule 85(b)). In a notable decision on victims' rights the ICC Trial Chamber I observed that whereas Rule 85(b) requires that legal persons 'sustained direct harm', Rule 85(a) does not include this stipulation for natural persons. Consequently, 'applying a purposive interpretation, it follows that natural persons can be the direct or indirect victims of a crime within the jurisdiction of the Court.'⁹² In other words,

⁹¹ E.g., Rule 89(2) ICC RPE states: 'The Chamber, on its own initiative or on the application of the Prosecutor or the defence, may reject the application if it considers that the person is not a victim or that the criteria set forth in article 68, paragraph 3, are not otherwise fulfilled.'

⁹² ICC, Decision on Victims' Participation, *Lubanga* (ICC-01/04-01/06-1119), Trial Chamber I ('TC I'), 18 January 2008, § 91; this view has also been confirmed by the Appeals Chamber; see Judgment on the Appeals of

with the exception of legal persons, the Court has accepted that the category of victim may be broadened to all those individuals who personally and concretely suffered harm, regardless of whether directly or indirectly.⁹³

In general terms, the Court has established that indirect victims are required to show that they suffered harm as a result of their relationship with the victim who has suffered direct harm.⁹⁴ The ICC Appeals Chamber determined, in particular, that a ‘close personal relationship’⁹⁵ might be a precondition for the participation for indirect victims in the proceedings; in this regard, harm suffered by indirect victims may include the psychological suffering caused by the death of a family member, or the material deprivation caused by the loss of the breadwinner.⁹⁶ Furthermore, the Chamber identified indirect victims as those individuals who intervened to prevent the commission of the crimes charged against the accused, provided that the direct victims suffered relevant harm.⁹⁷

Against this background the Rules of Procedure and Evidence of the Special Tribunal for Lebanon and the Internal Rules of the ECCC at a first sight seem to exclude indirect victims from being granted legal standing in the proceedings. Indeed, pursuant to Rule 2 of the STL RPE, victims must have suffered harm as a *direct result* of an attack within the Tribunal’s jurisdiction. The Internal Rules of the ECCC have similar wording requiring the victim to demonstrate that they suffered injury ‘as a direct consequence’ of a relevant crime.⁹⁸ Although the expression ‘direct result’ does not *a priori* exclude indirect victims, initially this was the interpretation preferred by the STL Chambers as set out in an explanatory document on the Tribunal’s procedure.⁹⁹ This interpretation, however, risks rendering the entire victims’ participation scheme almost meaningless. As a matter of fact, because of their special jurisdiction,¹⁰⁰ most direct victims of the crimes under these courts’ review are deceased.

the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, *Lubanga* (ICC-01/04-01/06-1432), Appeals Chamber (‘AC’), 11 July 2008, §§ 32, 39.

⁹³ Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, *supra* note no. 92, § 32.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ ICC, Redacted version of “Decision on Indirect Victims”, *Lubanga* (ICC-01/04-01/06-1813), TC I, 8 April 2009, § 50.

⁹⁷ *Ibid.*, § 51.

⁹⁸ Rule 23 bis (1)(b) ECCC IR.

⁹⁹ Reference is made here to ‘The Procedure of the Special Tribunal for Lebanon: A Snapshot’ (available at the STL website), which states as follows: ‘A “victim” is deemed to be a natural person who has suffered material or mental harm as a direct result of an attack within the Tribunal’s jurisdiction. Legal persons and those who have suffered indirect harm do not therefore enjoy the status of victim.’ (emphasis added) *Ibid.*, § 92, p. 35. See also J. de Hemptinne, ‘Challenges Raised by Victims’ Participation in the Proceedings of the Special Tribunal for Lebanon’, 8 *JICJ* (2010) 165-179, at 169.

¹⁰⁰ Article 1 STLSt. defines the Tribunal’s jurisdiction as follows: ‘The Special Tribunal shall have jurisdiction over persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime

Therefore, if the next of kin of deceased persons are not entitled to victim status, only a few individuals (the survivors) will be granted participatory rights in the proceedings. Accordingly, no chance would be offered to other persons to have access to justice.

It is remarkable, however, that these limitations included in the concept of victim before the STL and the ECCC have not prevented the two tribunals allowing indirect victims to participate in the proceedings. In a recent judgment, the ECCC Supreme Court Chamber authoritatively stated that ‘the term “direct victim” [...] is not coterminous with the category of persons who suffered injury as a “direct consequence” of the crime.’¹⁰¹ Indeed, indirect victims can also participate as civil parties so long as they ‘suffered injury as a direct consequence of the crimes committed against “the direct victim(s)”’.¹⁰²

A similar approach has been adopted by the STL. In a recent pronouncement, the Pre-trial Judge clarified that the expression ‘direct result’ is ‘a limiting factor that restricts the recognition of victim status only where persons are closely connected to the Attack or the direct victim thereof.’¹⁰³ Accordingly, indirect victims whose harm results from the physical or mental harm suffered by the direct victim need to show the direct victim’s presence at the scene of the crime, as well as their kinship, personal relationship or dependence on the direct victim.

4.2.2 The Concept of Harm

Although central to the concept of victim, the governing rules of the courts under examination do not define the concept of harm. The only indication in this respect is offered by the STL RPE, which indicates physical, material and mental harm as the three categories of harm which the Tribunal sets as a prerequisite for victim status. This is in line with what the ICC and the ECCC have held in their respective case law. In this regard, it is worth noting that, in contrast to the concept of victim that has emerged under international human rights law these

Minister Rafiq Hariri and in the death or injury of other persons.’ Article 2 of the ECCC Law, as amended in 2004 establishes: ‘Extraordinary Chambers shall be established in the existing court structure, namely the trial court and the supreme court to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.’

¹⁰¹ ECCC, Appeal Judgment, *Kaing Guek Eav alias ‘Duch’* (‘Duch’) (F28), AC, 3 February 2012, § 416.

¹⁰² *Ibid.*, § 417.

¹⁰³ STL, Decision on Victims Participating in the Proceedings, *Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi and Assad Hassan Sabra* (STL-II-O1/PT/PTJ), Pre-Trial Judge, 8 May 2012, § 46.

definitions, and their interpretation, do not include ‘substantial impairment of fundamental rights’ among the categories of harm.¹⁰⁴

None of the three courts examined explicitly indicates whether a certain threshold of harm is required for the purpose of victims’ application to participate in the proceedings. This issue is most likely to become particularly relevant in the reparation phase international¹⁰⁵ and national case law¹⁰⁶ have highlighted.

However, the threshold of harm may also become an issue in the initial evaluation of victims’ applications. For example judges may rule that the harm suffered by applicants must be of certain gravity in order to grant them legal standing. Generally speaking, criminalisation should be reserved for the most serious invasions of interests, while less serious misconduct is often dealt with by the civil law.¹⁰⁷ Accordingly, only individuals who have suffered harm above a certain threshold are allowed to participate in criminal proceedings while others may refer to alternative *fora*. This position is also supported by the definition of certain crimes within international tribunals’ jurisdiction, which explicitly requires that the harm suffered by victims be serious¹⁰⁸ and, more generally, by the fact that many international crimes entail the most serious violations of human rights.

A. PHYSICAL HARM

Physical harm is usually taken to mean bodily harm. This is the interpretation which has been adopted by the three international criminal courts at issue. Although the Rome Statute does not refer to ‘physical harm’, ICC Pre-Trial Chambers have held that ‘harm’ within the meaning of Rule 85(a) of the Rules includes physical injury.¹⁰⁹ According to the ECCC

¹⁰⁴ S. Fernández de Gurmendi, ‘Definition of Victims and General Principle’, *supra* note no. 89, at 432.

¹⁰⁵ See e.g. the case of Letelier and Moffitt, which was settled in arbitration proceedings between US and Chile in 1992. This decision is remarkable in that it provides a detailed description of the criteria that the Commission took into consideration to determine the amount of the ex gratia payment. Among other things, the Commission established different levels of compensation for each category of family members, according to the type of harm suffered. *Dispute Concerning Responsibility for the Deaths of Letelier and Moffitt (United States, Chile)*, 11 January 1992, *Reports of International Arbitral Awards*, vol XXV, 1-19, §§ 20-21, 31.

¹⁰⁶ For example, starting from 1990, Italy granted awards of state compensation to anyone who was injured or killed as a result of an act of terrorism or organised crime. However, compensation was only available where victim’s capacity to work was reduced by 25 per cent or more. See Law 20 October 1990, no. 302 (Norme a favore delle vittime del terrorismo e della criminalità organizzata).

¹⁰⁷ P. H. Robinson, ‘The Criminal-Civil Distinction and the Utility of Desert’, 76 *Boston University Law Review* (1996) 201-214.

¹⁰⁸ E.g., Art. 6(b) of the ICCSt. includes among the acts constituting the crime of genocide ‘[c]ausing serious bodily or mental harm to members of the group’. Similarly, Art. 8(2)(a)(iii) ICCSt. includes among the acts constituting war crimes ‘[w]ilfully causing great suffering, or serious injury to body or health’. (emphasis added)

¹⁰⁹ Cf., e.g., ICC: Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings, *William Samoeil Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* (ICC-01/09-01/11-249), Pre-

Supreme Court Chamber, the injury suffered by an applicant must be ‘[p]hysical, material or psychological’ and ‘physical injury denotes biological damage, anatomical or functional. It may be described as a wound, mutilation, disfigurement, disease, loss or dysfunction of organs, or death.’¹¹⁰ Similarly, the Pre-Trial Judge of the STL has found that “‘physical harm” encompasses substantial bodily injuries, ordinarily requiring a degree of medical treatment for the victim’.¹¹¹ Remarkably, the STL Judge has also observed that the requirement of a certain threshold for physical harm included in Rule 2 of the STL RPE is ‘consistent with the spirit of that Rule, which is to define victims rather narrowly so as to “prevent [them] from being too numerous”, thereby making the proceedings “cumbersome and slow”’.¹¹²

Although the aforementioned courts seem to agree that physical harm should encompass injuries which are not merely of a less serious character, no legal instrument defines the applicable threshold and nor have the courts under examination elaborated further on the categories of physical harm which may or may not be considered as meeting the requirement. This may be especially relevant when, for example, the victim cannot prove the harm suffered, or cannot show permanent sign of harm through marks on their body, for example (and this is unfortunately the case with victims of certain forms of torture and inhuman treatments). Setting a threshold of harm should not, therefore, bring to a substantial denial of justice for the victims of certain crimes.

The courts have not yet engaged in this analysis, since the crimes charged in the cases brought thus far only refer to crimes which have caused serious harm on victims *per se* (such as, murder or rape). The issue of the threshold of harm is, however, likely to become relevant in the event that the courts open cases for conducts which are only criminalised if they cause great suffering.¹¹³ Furthermore, the evaluation of the gravity of the injury will be certainly considered during the proceedings for reparation.

B. MENTAL HARM

Mental harm includes suffering of emotional, psychological or psychiatric nature. This type of harm has been recognised before all the courts under examination. In the jurisprudence of

Trial Chamber (‘PTC’) II, 5 August 2011, § 50; Decision on Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, *Situation in the Democratic Republic of the Congo* (ICC-01/04-101/tEN-Corr), PTC I, 17 January 2006, §172 (containing further references to the jurisprudence of the Inter-American and the European Courts of Human Rights).

¹¹⁰ ECCC, Appeal Judgment, *Duch*, *supra* note no. 101, §§ 416-417.

¹¹¹ STL, Decision on Victims Participating in the Proceedings, *supra* note no. 103, § 66.

¹¹² *Ibid.*, § 65, citing Explanatory Memorandum by the Tribunal’s President, November 2010, §§ 18-19.

¹¹³ *Supra* note no. 108.

the ECCC the injury suffered by a victim ‘may also be psychological and include mental disorders or psychiatric trauma, such as post-traumatic stress disorder’.¹¹⁴ Moreover, the ECCC judges have observed that ‘[i]n grave or prolonged cases, psychological injury may lead to physical injury by causing various ailments.’¹¹⁵ At the ICC, harm has been interpreted as comprising ‘emotional suffering’.¹¹⁶ Likewise, the STL Pre-Trial Judge has held that ‘the notion of mental harm in Rule 2 of the Rules encompasses harm of emotional, psychological or psychiatric nature’ and that ‘to be characterised as “harm” for the purpose of granting VPP [victim participating in the proceedings] status to applicants, emotional distress must be serious.’¹¹⁷

In general terms, the courts under examination favour a strict assessment of this category, based on two criteria: (i) mental harm should be recognisable, meaning that it should correspond to a disease of psychic nature recognised by the medical profession, or (ii) there should be a specific relationship between the person claiming mental harm and the direct victim of the crime at issue.

The first requirement, that the mental harm is recognisable, prescribes that the applicant provides proof that he or she suffered a mental harm which has been recognised as such by a professional. Accordingly, some types of emotional suffering of a lower threshold such as distress, sadness, disappointment or anger shall not be recognised as mental harm for the purposes of legal standing in a criminal trial. This view has also been supported by the Cambodian Tribunal in the following terms:

[P]sychological harm has a dimension and character distinct from the emotional distress that may be regarded as inevitably caused to witnesses of crimes of this nature and their application will be rejected unless they have witnessed events of an exceedingly violent and shocking nature.¹¹⁸

Such a threshold does not seem to be required for other types of victims and, in particular, for those victims who have a specific relationship with the direct victim of the crime. It seems indeed to be unanimously recognised by international case law that there should be a presumption of psychological harm for the members of the direct family (parents, children,

¹¹⁴ ECCC, Appeal Judgment, *Duch*, *supra* note no. 101, § 415.

¹¹⁵ *Ibid.*, § 417.

¹¹⁶ ICC, Decision on Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, *supra* note no. 109, § 147.

¹¹⁷ STL, Decision on Victims Participating in the Proceedings, *supra* note no. 103, § 78.

¹¹⁸ ECCC, Order on the Admissibility of Civil Party Applicants from Current Residents of Kratie Province, *Nuon Chea* (D414), Office of the Co-Investigating Judges, 9 September 2010, § 15(d).

spouses and siblings) of the immediate victim. In such cases, as was first elaborated by the IACtHR, the applicant does not need to prove that he/she has suffered specific mental harm.¹¹⁹ This approach has been also followed by the ICC; in this respect, the ICC Appeals Chambers in the *Lubanga* case, in relation to the parents of child soldiers, observed that:

Harm suffered by one victim as a result of the commission of a crime within the jurisdiction of the Court can give rise to harm suffered by other victims. This is evident for instance, when there is a close personal relationship between the victims such as the relationship between a child soldier and the parents of that child. The recruitment of a child soldier may result in personal suffering of both the child concerned and the parents of that child.¹²⁰

In the same vein, the STL Judge ruled that a presumption of mental harm only applies to first-degree relatives or ‘persons in a relationship of similar closeness’ in case of death of the direct victim.¹²¹ Conversely, in line with human rights case law, the relative presumption is only granted to extended family members (grand-parents, aunts and uncles, nieces and nephews, cousins, in-laws and other indirect kin) of the direct victim who may be requested to show ‘credible or convincing evidence demonstrating an affective relationship with the disappeared persons that goes beyond simple consanguinity’.¹²² In this respect, the STL Pre-Trial Judge has observed that ‘the burden of proving the mental harm suffered by indirect victims is contingent on the gravity of the harm suffered by the direct victim and on the closeness of the relationship between the two.’¹²³ In particular, if the direct victim sustained only minor harm, mental harm suffered by family members should not be considered as rising to the level of harm required for the granting of victim status.

¹¹⁹ IACtHR, *Aloeboetoe v. Suriname*, *supra* note no. 48. Similarly, Article 3.3 of the ECCC Practice Direction provides that ‘psychological harm may include the death of kin who were the victims of such crimes’.

¹²⁰ ICC, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, *supra* note no. 92, § 32. See also with respect to next of kin of deceased victims, ICC, Corrigendum to the “Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of Congo by a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 to a/0110/06, a/0188/06, a/0128/06 to a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06, a/0227/06 to a/0230/06, a/0234/06 to a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06 and a/0241/06 to a/0250/06, Lubanga (ICC-01/04-423), PTC I, 31 January 2008, §§ 23-25; Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07, *Ahmad Harun et al.* (ICC-2/05-111), PTC I, 6 December 2007, PTC I, § 35.

¹²¹ STL, Decision on Victims Participating in the Proceedings, *supra* note no. 103, § 84.

¹²² IACtHR, *Garrido and Baigorria v. Argentina*, Judgment (Reparations and Costs), 27 August 1998, § 64. See on this point, e.g., ECCC, Judgment, *Duch* (E188), TC, 26 July 2010, § 643.

¹²³ STL, Decision on Victims Participating in the Proceedings, *supra* note no. 103, § 83.

C. MATERIAL HARM

Material harm generally refers to three categories of damages: (i) the destruction, damage or deterioration with regard to an item of property (such as a house, a car, a shop, for instance); (ii) the material deprivation linked to the loss of the material contribution of the breadwinner; and (iii) lost profits resulting from the commission of a criminal act. The case law of international criminal tribunals seems to accept only the first two categories as meeting the harm requirement for the assessment of the victim status.

In the jurisprudence of the ICC harm within the meaning of Rule 85(a) of the ICC Rules of Procedure and Evidence has been interpreted, *inter alia*, as economic loss.¹²⁴ Such economic loss can be claimed both by direct and indirect victims (if natural persons).¹²⁵ Similarly, in the practice of the ECCC, the notion of material injury has been understood as ‘a material object’s loss of value, such as complete or partial destruction of personal property, or loss of income.’¹²⁶ In the same vein, the STL Pre-Trial Judge has considered that material harm refers to ‘damage to, or destruction or deterioration of property, loss of income or of means of subsistence and other forms of financial loss’.¹²⁷

With the exception of the STL, claims for material harm may also be submitted by legal persons for damages to properties dedicated to religion, education, art, or science or charitable purposes, which are often targets of war crimes.¹²⁸ Furthermore, as observed above, material harm may be claimed by those persons who prove evidence of economic dependence from the direct victim of a crime.¹²⁹

On the other hand, contrary to human rights law, it does not seem that international criminal tribunals accept lost profits or opportunities as a category of material harm.¹³⁰ In other words, only concrete losses give standing for victims’ participation in the proceedings. This choice has likely been dictated by logistical concerns. Most of the crimes that are brought before international criminal tribunals are committed in situations of political unrest, armed conflicts, or social disorders – situations in which almost all basic activities of the affected region are disrupted. It would be completely unworkable, and possibly unfair, for a

¹²⁴ ICC, Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings, *supra* note no. 109, § 50

¹²⁵ See e.g., ICC, Public Redacted Version of “Decision on the 52 Applications for Participation at the Pre-Trial Stage of the Case”, *Bahar Idriss Abu Garda* (ICC-02/05-02/09-137-Red), PTC I, 9 October 2009, §§ 93-96; ICC, Redacted version of “Decision on ‘Indirect Victims’”, *supra* note no. 96, §§ 49-50.

¹²⁶ ECCC, Appeal Judgment, *Duch*, *supra* note no. 101, § 415.

¹²⁷ STL, Decision on Victims Participating in the Proceedings, *supra* note no. 103, § 72.

¹²⁸ Rule 85, ICC RPE; ‘Glossary’, ECCC IR.

¹²⁹ ICC, Redacted version of “Decision on ‘Indirect Victims’”, *supra* note no. 96, § 50.

¹³⁰ ‘Glossary’, ECCC IR.

tribunal with the mandate to adjudicate individual criminal responsibility to take into account all the costs of such disruption in these situations.¹³¹

4.2.3 *The Causal Link Requirement*

As indicated in the definitions of victim adopted by recently established international and internationalized criminal tribunals, a person claiming to be a victim must be able to establish that the harm he or she suffered resulted ‘as a result of’ the commission of a crime within the jurisdiction of the tribunal where participation is being sought. In other words, there must be a causal link between the harm suffered by the victim and the international crime.¹³²

What guides the courts in the interpretation of this requirement is the need to exclude harm that is too remote from the crime without unduly limiting the number of victims. Accordingly, the ‘causal link’ requirement has been strictly interpreted as entailing *factual causation*. In this respect, the Cambodian Chambers held that applicants for civil party status must establish that the harm they allegedly suffered is ‘a direct consequence of facts within the scope of the judicial investigation’.¹³³ In a similar vein, the STL Pre-Trial judge specified that the expression ‘direct result’ in the definition of victim provided by Rule 2 of the RPE refers to the requirement of causation.¹³⁴

Furthermore, the courts have required applicants to show that the alleged crime was a direct rather than ancillary contributing factor to the international crime.¹³⁵ Accordingly, persons who suffered indirect harm may be recognised as victims provided that the harm they allegedly sustained arose out of the harm suffered by direct victims (which, in turn, was caused by the commission of the crimes charged).¹³⁶ On the contrary, persons who suffered harm as a result of the conduct of direct victims are not entitled to victim status.

¹³¹ J. De Hemptinne, ‘Challenges Raised by Victims’ Participation in the Proceedings of the Special Tribunal for Lebanon’, *supra* note no. 99, at 170.

¹³² See Rule 85(a) ICC RPE; Rule 2 STL RPE; Glossary ECCC IR.

¹³³ ECCC, Order on the Admissibility of Civil Party Applicants from Current Residents of Kep Province, *Nuon Chea, Khieu Samphan, Ieng Sary, Ieng Thirith, Kaing Guek Eav alias “Duch”* (D392), Office of the Co-Investigating Judges, 25 August 2010, § 15.

¹³⁴ STL, Decision on Victims Participating in the Proceedings, *supra* note no. 103, § 39.

¹³⁵ For instance, the ECCC have expressed this ‘necessary’ condition as follows: ‘... [I]n order for a Civil Party application to be admissible, the applicant is required to demonstrate that his or her alleged harm results only from facts for which the judicial investigation has already been opened.’ See Order on the Admissibility of Civil Party Applicants from Current Residents of Kep Province, *supra* note no. 133, § 19. (emphasis added)

¹³⁶ ICC, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, *supra* note no. 92, § 32; STL, Decision on Victims Participating in the Proceedings, *supra* note no. 103, §§ 49-50; ECCC, Appeal Judgment, *Duch*, *supra* note no. 101, §§ 417 and 462.

This latter category of individuals was the subject of a much-debated decision of ICC Trial Chamber I in the *Lubanga* case where it was held that applicants who suffered harm as a result of the crimes committed by child soldiers (the direct victims of the case) could not be considered as indirect victims.¹³⁷ While recognising that a certain ‘factual overlap’ may exist,¹³⁸ according to the Trial Chamber there is no causal link between the use of children in hostilities and the impact of their conduct on other persons. In other words, the crime charged against Lubanga was not a necessary cause for the conduct of child soldiers and accordingly the victims of such conduct may not be considered as victims of the case.

While the reasoning of Trial Chamber’s I decision remains questionable,¹³⁹ it nonetheless has the merits of calling attention to two critical issues concerning the assessment of the ‘causal link’ requirement. First, since a causal link must be established between the harm allegedly suffered by the applicants and the crimes which the defendant is accused of, the prosecutor holds a crucial role in determining who the victims of a case are, through his discretionary powers of specifying the charges against the accused. Second, analysis of the courts’ assessment of the causal link requirement may only be partial, since the courts never disclose detailed descriptions of the harm alleged by victims. Rather, as in the cases analysed above, the courts’ decisions only declare whether the harm allegedly suffered by the applicant is causally linked to the charges against the accused, without explaining in which terms this link is established (e.g., foreseeability, directness, proximate cause, and so forth).¹⁴⁰ Thus, it is not possible, at least at the present time, to determine the model of causality the courts adopt and whether this choice is carried out in a consistent manner.

4.3 A One-Size-Fits-All Concept?

It has been often argued that the main pitfall of the definition of the victim in international criminal law is that it does not distinguish between the different rationales behind victims’

¹³⁷ ICC, Redacted version of “Decision on ‘Indirect Victims’”, *supra* note no. 96.

¹³⁸ *Ibid.*, § 52.

¹³⁹ For a critical appraisal of the decision, see V. Spiga, ‘Indirect Victims’ Participation in the Lubanga Trial’, 8 *JICJ* (2010) 183-198.

¹⁴⁰ On the categories of causal link in international criminal law, see C. McCarthy, ‘Reparations under the Rome Statute of the International Criminal Court and Reparative Justice Theory’, 3 *International Journal of Transitional Justice* (2009) 250-271, at 259-260. According to the author, ‘intent’ and ‘foresight’ are more likely than ‘causation’ to be used by the Court in assessing whether there is a causal link permitting to attribute certain harm to a perpetrator.

rights in the proceedings.¹⁴¹ For example, the ICC Statute indiscriminately uses the term ‘victim’ in Article 68, in relation to the submission of victims’ representations, views and concerns at various stages of the proceedings and in Article 75 with regard to the right to reparation. These rights may have an extremely different impact on the fairness and efficiency of the proceedings, especially when they are likely to be exercised by a very large amount of persons.

It is submitted that victims’ rights in the proceedings cannot be conceived as absolute in nature and necessarily need to be counterbalanced with other primary guarantees of the criminal process.¹⁴² This can be done through a reading of the rules setting out the definition of victim seen above in conjunction with those provisions establishing victim’s rights in the proceedings. By doing so, it is possible to identify at least two different concepts of victims potentially identifying differently-sized groups of individuals: the concept of victim-participant and the concept of victim entitled to reparations.

4.3.1 The Concept of Victim Participant

The concept of victim participant identifies those victims that are entitled to exercise participatory rights before international and internationalized criminal tribunals. Such a concept can be derived from a reading of the rules setting out the definition of victim seen above in conjunction with those provisions establishing a victim’s right to participation in the proceedings.

The ICC Statute does not grant all victims an automatic right of participation in the criminal process. Rather, victims wishing to participate in the proceedings must file an application to the Registrar who transmits it to the relevant chamber and makes copies available to the prosecutor and the defence, who then have the opportunity to comment on them. It is, however, the competent chamber which retains the last word on whether the application shall be accepted or rejected on the basis of the legal test set by Article 68(3) of the ICC Statute. More precisely, victims’ applications for participation must comply with four cumulative requirements: (i) the applicant is a ‘victim’; (ii) ‘the personal interests’ of the

¹⁴¹ In this respect, Rule 85 of the ICC RPE has been defined ‘a catch-all provision’. H. Friman, ‘The International Criminal Court and Participation of Victims: A Third Party to the Proceedings?’, 22 *Leiden Journal of International Law* (2009) 485-500, at 490.

¹⁴² This is, for example, explicitly indicated in Article 68(3) of the ICCSt., which provides as follows: ‘Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial.’ (emphasis added)

victim are affected; (iii) the stage of the proceedings in which the applicant wishes to participate are deemed appropriate by the relevant chamber; and (iv) victims' participation shall not be 'prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial'. In considering these four conditions, whereas the second pair grants the judges explicit powers to rule on the timing and the modalities of victims' participation, the first one explicitly determines who is entitled to the right to participate. Accordingly, a conjunctive reading of these two prerequisites, the victim's status and the personal interests being affected identifies the applicable concept of *victim participant*.

In this regard it is important to note that the current jurisprudence of the Appeals Chamber indicates that, whereas the ordinary meaning of Rule 85 does not *per se* restrict the concept of victim only to those persons directly affected by the crimes charged, Article 68(3) of the Statute confines the right of participation to those victims whose harm resulted from the crimes charged against the accused.¹⁴³ In other words, for the purposes of participating in the proceedings, Rule 85 shall be interpreted as requiring applicants to establish a causal link between the harm they suffered and the crimes charged against the accused. Accordingly, the events from which the applicants claim to have suffered harm must fall within the crimes charged against the accused. For instance, an ICC Trial Chamber in the *Bemba* case held that persons claiming to have suffered destruction of property by fire could not be granted victim status since the accused was only charged with the crime of pillage.¹⁴⁴

The second prerequisite of the participant status of victims is that their *personal interests* are affected by the proceedings in which participation is sought. As no guidance is offered in this respect by the ICC legal framework,¹⁴⁵ the interpretation of the notion of 'personal interest' has been a recurrent aspect of the jurisprudence from the outset. In particular, one thorny issue with which the Court has had to deal with so far is how victims' personal interests should be defined. A conceptual analysis of Article 68(3) reveals that a broad definition of the phrase victims' 'personal interests', coinciding with victims' general

¹⁴³ ICC, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, *supra* note no. 92, §§ 58, 62. The Appeals Chamber's decision reversed an early jurisprudence of Trial Chamber I according to which evidence of a causal link between the harm allegedly suffered and any crime within the jurisdiction of the Court would suffice to grant the applicants the procedural status of victims; see Decision on Victims' Participation', *supra* note no. 92, § 94.

¹⁴⁴ ICC, Decision on the Participation of Victims in the Trial and on 86 Applications by Victims to Participate in the Proceedings, *Jean-Pierre Bemba Gombo* (ICC-01/05-01/08-827), TC III, 30 June 2007, §§ 89-90.

¹⁴⁵ No suggestion in this respect comes from the preparatory works, whereby the language does not appear to have given rise to any significant debate at any point in the drafting of the Statute (it appears in the ICC Preparatory Committee's Draft Statute as early as its August 1997 session). See Decisions Taken by the Preparatory Committee at its Session Held in New York, 4 to 15 August 1997 (A/AC.249/1997/L8/Rev.1 (1997)), 14 August 1997.

interests, is conceptually mistaken. The expression of ‘personal interests’ should be distinguished from the expression ‘interests of the victims’ which is also used in the Statute.¹⁴⁶ While the first specifically refers to individual interests which are promoted by victims and their legal representative, and which entitle victims to participation, the latter more generally indicates collective interests whose respect remains an obligation of the Court’s organs.

This distinction, however, has not been consistently upheld by the different chambers. On the one hand, Trial Chambers and the Appeals Chamber have strongly stressed the need for the notion of personal interest to be distinguished from the ‘general interests of victims’, requiring victims to establish ‘a real evidentiary link between the victim and the evidence which the Court will be considering during (the) trial, leading to the conclusion that the victim’s personal interests are affected’.¹⁴⁷ On the other hand, the Pre-Trial Chambers have approached the notion very liberally. Single Judge Politi exemplified this understanding, holding that ‘there seems to be little doubt... that [the impact on personal interests] requirement is met whenever a victim... applies for participation in the proceedings’,¹⁴⁸ and that ‘the fact that... victims’ personal interests are ‘affected’ by criminal proceedings relating to the event or events in question seems incontrovertible’.¹⁴⁹ Such a liberal approach ultimately nullifies any meaningful legal effect of the ‘personal interests’ requirement. This means, *inter alia*, that Article 68(3) would not include this expression with the purposes of somehow limiting the exercising of victims’ participatory rights in the proceedings. Doubts remain as to the correctness of such an approach, especially in view of the statutory distinction between personal interests and the interests of victims.

¹⁴⁶ E.g., Rules 16(2), 69, 73(6), and 90(4) ICC RPE.

¹⁴⁷ ICC, Decision on Victims’ Participation, *supra* note no. 92, § 95. In this respect, the Trial Chamber held that the ‘question of whether “personal interests” are affected are necessarily fact-dependent. In this respect, involvement in or presence at a particular incident which the Chamber is considering, or if the victim has suffered identifiable harm from that incident, are examples of the factors that the Chamber will be looking for prior to granting the right to participate’. *Ibid.*, § 96. The Appeals Chamber also held in this respect that Article 68(3) requires that the Chamber establish ‘whether the interests asserted by victims do not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor.’ See Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/ and a/0105/06 Concerning the “Directions and Decision of the Appeals Chamber” of 2 February 2007, *Lubanga* (ICC-01/04-01/06-925), AC, 13 June 2007, § 28.

¹⁴⁸ ICC, Decision on Victims’ Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, *Situation in Uganda* (ICC-02/04-101), PTC II, 10 August 2007, at § 9. See also, e.g., Decision on Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, *supra* note no. 109, at § 63, where the Chamber held that ‘the personal interests of victims are affected in general at the investigation stage, since the participation of victims at this stage can serve to clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered.’

¹⁴⁹ ICC, Decision on Victims’ Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, *supra* note no. 148, at § 9.

A similar concept of victim participant has also been adopted in the context of the Special Tribunal for Lebanon which has, within its legal framework, a rule specifically dealing with the concept of ‘victim participating in the proceedings’. Accordingly, not all the victims, generally defined by Rule 2 of the RPE will necessarily be allowed to participate in the proceedings. In order to preserve the rights of the accused and to ensure the efficiency of the trials they must have been authorised to do so by a judge after a hearing with the parties. In particular, Rule 86(A) states that ‘a person claiming to be the victim of a crime’ may request the status of victim participating in the proceedings only after the Pre-Trial Judge has confirmed the indictment. The main consequence of this provision is that applicants will necessarily be required to show *prima facie* proof of a causal link between the harm they have allegedly suffered and the crimes with which the accused is charged. Although the wording of both Rule 86(A) and Rule 2 refers simply to ‘any crime within the Tribunal’s jurisdiction’, the STL will most likely follow the jurisprudence of the ICC and the ECCC on this point, explicitly requiring a link with the charges against the accused. This task is facilitated at the STL by the fact that victims may only participate when the charges have already been confirmed against an accused.

Rule 86(B) of the STL RPE provides ten criteria that the judge shall take into account when ruling on applications for participation. The way Rule 86(B) is structured and phrased suggests that the first four conditions are to be considered *necessarily and cumulatively*, whereas the other six appear as optional criteria which may be resorted to at the discretion of the judge.¹⁵⁰ The four prerequisites are in fact very much similar to those set out in Article 68(3) of the ICC Statute, namely:

(i) [W]hether the applicant has provided prima facie evidence that he is a victim as defined in Rule 2; (ii) whether the applicant’s personal interests are affected; (iii) whether the applicant’s proposed participation is intended to express his views and concerns; and (iv) whether the applicant’s proposed participation would be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

It will be interesting to see to what extent the STL judges will adopt an interpretation similar to that of the ICC, especially in view of the fact that only a relatively small number of victims will be applying for participation at the STL compared to those who apply to the ICC.

Although in a less well-elaborated form, the ECCC legal framework also indicates that not all the victims identified through IR 2 will be entitled to participate in the criminal

¹⁵⁰ This distinction is identified by the difference in wording in Rule 86(B) STL RPE: the first four criteria are introduced by ‘shall consider in particular’, while the other six are introduced by ‘may also consider’ (emphasis added). See also STL, Decision on Victims Participating in the Proceedings, *supra* note no. 103, § 102.

proceedings. Pursuant to IR 23*bis* only those victims who are able to show that they suffered harm as a direct consequence of one of the crimes alleged against the accused may be admitted as a civil party.¹⁵¹

4.3.2 *The Concept of Victim Entitled to Reparation*

In contrast to the concept of victim-participant, provisions on the right to reparation do not set out specific conditions with the aim of limiting the number of victims to whom such a right is granted. Rather, what can be observed in the law and practice of international criminal tribunals is the adoption of an inclusive approach with respect to the concept of victims entitled to reparation.

ICC Chambers have held on a number of occasions that Rule 85 of the ICC RPE (setting out the definition of victim) ‘must be read in context and in accordance with its object and purpose.’¹⁵² More specifically, the Chambers have noted that there is nothing in Rule 85 referring to its application only in the context of the participation of victims; rather, such a provision has the general aim of defining victims (whatever their procedural role is).¹⁵³ However, the Appeals Chamber determined that, while the ordinary meaning of Rule 85 does not *per se* restrict the concept of victim only to those persons directly affected by the crimes charged, Article 68(3) of the Statute (which regulates the participation of victims in the proceedings) limits the right of participation to those victims whose harm resulted from the crimes charged.¹⁵⁴ In so doing, the Court seems to acknowledge that there may well be different categories of individuals that can be granted victim status pursuant to Rule 85. Nevertheless, certain categories may be excluded from this status when it is associated with participatory rights.

A similar argument was advanced by the ICC Office of the Prosecutor in a recent document entitled ‘Policy Paper on Victims’ Participation’. In this respect, the Office

¹⁵¹ In the initial hearing of the *Duch* case, the Court held that ‘when reviewing the civil party applications received in this case the Chamber must satisfy itself, from the information provided, that it is possible to consider whether the applicant has indeed suffered damage, and whether this damage is the direct consequence of an offence under the jurisdiction of the Chamber.’ See Transcripts of Proceedings, *Duch*, TC, 17 February 2009, p. 33.

¹⁵² ICC, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, *supra* note no. 92, § 54.

¹⁵³ *Ibid.*, § 58.

¹⁵⁴ *Ibid.*, §§ 58, 62. See also Separate and Dissenting Opinion of Judge René Blattmann, Decision on Victims’ Participation, *supra* note no. 92, §§ 8, 15-17.

recognised that the concept of victim might be interpreted in a broader sense for the purposes of exercising the right to reparation:

[Fo]r the reparations stage, the Office favours a wider approach to allow participation of victims and representations from or on behalf of victims and other interested persons who suffered harm as a result of crimes other than those included in the charges selected for prosecution. Any other approach would be overly restrictive and unfair, since the Prosecution must necessarily limit the incidents selected in its investigation and prosecution. Accordingly, the Office will support reparations applications, as appropriate, by *a broader range of individuals and entities* than those who are linked to the charges for which the accused is ultimately convicted.¹⁵⁵

In the recently adopted decision on the principles of reparation in the *Lubanga* case, the ICC Trial Chamber found that:

[R]eparation may be granted to direct and indirect victims, including the family members of direct victims ... anyone who attempted to prevent the commission of one or more of the crimes under consideration; and those who suffered personal harm as a result of these offences, regardless of whether they participated in the trial proceedings.¹⁵⁶

To that end, the Court recognised, in conformity with human rights jurisprudence, that ‘the concept of “family” may have many cultural variations, and the Court ought to have regard to the applicable social and familial structures.’¹⁵⁷ The Court also found that reparation may also be granted to legal entities, including:

[N]on-governmental, charitable and non-profit organisations, statutory bodies including government departments, public schools, hospitals, private educational institutes, companies, telecommunication firms, institutions that benefit the members of the community (such as cooperative and building societies, or bodies that deal with micro finance), and other partnerships’.¹⁵⁸

It is suggested that the adoption of such a broad concept of victim for the purposes of reparation can be explained by the fact that, in most cases, a collective approach to reparation will be adopted, hence the high number of individuals recognised as victims does not risk jeopardizing the effective realisation of reparation programmes. This was indicated by the ICC in the recent decision on reparation in the following terms:

¹⁵⁵ ICC, Policy Paper on Victims’ Participation, Office of the Prosecutor, April 2010, at 9 (emphasis added).

¹⁵⁶ ICC, Decision Establishing the Principles and Procedures to Be Applied to Reparations, *Lubanga* (ICC-01/04-01/06-2904), TC I, 7 August 2012, at § 194.

¹⁵⁷ *Ibid.*, § 195.

¹⁵⁸ *Ibid.*, § 197.

Given the uncertainty as to the number of victims of the crimes in this case – save that a considerable number of people were affected ... the Court should ensure there is a collective approach that ensures reparations reach those victims who are currently unidentified.¹⁵⁹

This approach has also been confirmed by the law and practice of the Extraordinary Chambers in the Courts of Cambodia. Indeed, whereas only civil parties (those victims who satisfy the requirements for participation) have the right to reparation, Rule 23 *quinquies* establishes that reparation may only be moral and collective. Accordingly, measures ordered by the Chambers are likely to address a large group of persons, potentially involving not only the civil parties but also their families and communities. In the *Duch* case, for instance, the Chambers ordered as a measure of reparation the compilation and publication of all statements of apology and acknowledgments of responsibility made by the accused during the course of the trial.¹⁶⁰

Although the Special Tribunal for Lebanon does not grant victims a right to reparation, its legal framework indicates that the concept of victim entitled to reparation may be in principle broader than that of victim participants. Indeed, Article 25 of the STL Statute indicates that, following the conviction of the accused, the Tribunal ‘may identify victims who have suffered harm as a result of the commission of crimes’. Moreover, pursuant to Rule 86(G) of the STL RPE, ‘any person identified in a final judgment as a victim, or otherwise considering himself or herself victim ... may request from the Registrar a certified copy of the judgment for the purpose of exercising his or her rights under national or other relevant law’. A conjunctive reading of these provisions indicates that in order to be identified in a final judgment (for the purpose of claiming reparation before domestic or other competent *fora*) individuals only need to be recognised as victims and do not need to meet the requirements for the victim-participant status. Victims identified in the final judgment for the purposes of reparation may in fact be a much broader group than victim-participants since fairness and efficiency concerns are less likely to play a role in this determination.

¹⁵⁹ *Ibid.*, § 219.

¹⁶⁰ ECCC, Judgment, *Duch*, *supra* note no. 122, §§ 668-669.

5 AN EMERGING SHARED CONCEPT OF VICTIMS FOR SERIOUS VIOLATIONS OF HUMAN RIGHTS?

5.1 The Constitutive Elements of an Emerging Shared Concept of Victim

The protection of individuals from the harmful effects of internationally wrongful acts is the primary mission of both international humanitarian law and international human rights law. Protection of and redress for individuals harmed by international crimes can also be considered part of the mandate of recently established international criminal tribunals. From this perspective, a broad and comprehensive concept of victim has its merits, namely (i) attenuating the harmful effects of a violation, and (ii) enlarging the protection in respect to all those persons who may potentially suffer harm as a result of an armed conflict or gross human rights violations. Unfortunately, it would be completely unrealistic to imagine that all victims in a broad sense could be entitled to exercise the right to bring a claim before an international court or to obtain reparation for the harm suffered. Consequently, as has been argued in the previous section, these three bodies of law have set out certain prerequisites for the concept of victim to have legal meaning.

Despite the specific differences singled out throughout the Chapter, the definitions of victim elaborated within distinct bodies of international law under examination have three elements in common: (i) the victim must have suffered *harm*; (ii) a *violation* of international law has to have occurred; and (iii) there must be a *link* between the harm suffered and the international wrongful act at issue. Only when these three requirements are *cumulatively* met, may the concept of victim acquire legal meaning, that is, the victims so identified may be entitled to exercise certain rights in accordance with the specific body of law applicable.

As this Chapter has shown, *harm* is central to the concept of victim. The concept of harm has been generally interpreted in a broad manner, including material, physical and mental harm, as well as, for instance, the loss of the opportunity to achieve self-fulfilment. Moreover, focusing the concept of victim on the concept of harm and not on the link between the wrongful act and the victim (as was the case in relation to the definition of victim adopted by the ad hoc Tribunals) has allowed human rights bodies and international criminal tribunals to grant victim status to persons who have not been directly targeted by the violations, such as the relatives and dependants of direct victims.

On the other hand, the concept of victim is always linked to the *violation* of a norm of international law. In the case of international humanitarian law, for instance, it has been

observed that the person claiming victim status must suffer harm as a result of a concrete violation of the *jus in bello*: this limit arises from the recognition that certain collateral damage caused by military operations may indeed be lawful and, as such, do not trigger the responsibility of the attacker towards the victims. Likewise, an individual claiming victim status before international criminal tribunals must have suffered harm from an international crime which falls into the jurisdiction of the relevant tribunal and, more precisely, from the crimes charged against the accused in the case where participation and/or reparation is sought. A broad interpretation of the concept of victim for the purposes of participation in the proceedings, indeed, risks undermining the courts' mandate. For example, from the perspective of the accused's right to a fair trial, it would certainly be better to clarify that only those persons against whom the crimes charged have been allegedly committed can participate in the proceedings. Furthermore, narrowing the category of victims entitled to participate may result in a considerable reduction of filings and interventions, eventually contributing to the expeditiousness of the trial itself.

Finally, a *causal nexus* must exist between the harm suffered by the individual claiming victim status and the relevant violation of international law. In this respect, we have observed in this Chapter that no specific criteria of causation has been adopted and that courts have often opted for a broad interpretation of this requirement; whilst it is necessary to exclude false or preposterous claims, as well as claims of persons who have only remotely suffered from the violation at issue, it is in fact important not to place a too high burden on legitimate claims of victims.

5.2 Particular Features of the Concept of Victim in Cases of Gross Violations of Human Rights

In situations of gross and systematic violations of human rights, the identification of victims poses two main challenges. The first challenge relates to the quantitative aspect of this type of violations: the sheer number of individuals that may be potentially eligible for victim status. The second challenge is that victims of this type of violations are most often victimised in a specific way, entailing special characteristics of victimhood. In particular, as observed previously, it is not only individuals that can be recognised as victims but also groups may also become targets and victims of these violations. Furthermore, in cases of mass victimisation, the society at large where atrocities have occurred may be considered as victimised.

As already observed, mass victimisation poses great challenges when victim status is associated with the exercise of rights, such as the right to have access to justice, to participate in proceedings and to seek reparation. Ideally, all those who meet the terms of the definition of victim should be granted rights. Yet, when dealing with victims of gross human rights violations, such an overall recognition would render any specific right void of substance and would deny proper victim recognition to those harmed in a specific way by the violations at issue.

In such situations, apparently opposing considerations and factors play a role. On the one hand the attempt to enforce rights in an inclusive way with respect to all victims and on the other, the policy factor where a line must be drawn in situations where there is a large number of victims. In this respect, it has been argued that ‘delimitations seem necessary.’¹⁶¹ Nonetheless, as I will argue in the next section, delimitation does not necessarily mean exclusion. Rather, an interesting approach seems to be emerging from the practice of international human rights bodies and international criminal tribunals linking the interpretation of victim status to the rights which are conditioned upon the recognition of such a status. In other words, a *functional interpretation* of the concept of victim is emerging particularly in cases of gross violations of human rights and international crimes.

5.3 A Functional Interpretation of the Concept of Victim

As observed above, the recognition of victims’ rights at the international level, especially in cases of gross human rights violations and international crimes where a large number of individuals can be recognised as victim may have a considerably different impact upon the effective realisation of those rights. A distinction can be drawn, for instance, between individual-based rights and collectivity-based rights. Individual-based rights rest on the principle that the violation of an individual’s right creates a corresponding individual right to access to justice and to reparation (as has been explored in Chapter I). This category of rights includes, therefore, the right of participation in proceedings before international *fora* (*locus standi in judicio* before human rights supervisory bodies, participation in international criminal proceedings).

¹⁶¹ H. Rombouts, P. Sardaro and S. Vandegiste, ‘The Right to Reparation for Victims of Gross and Systematic Violations of Human Rights’, in K. De Feyter, S. Parmentier, M. Bossuy and P. Lemmens (eds), *Out of the Ashes: Reparation for Victims of Gross and Systematic Violations of Human Rights* (Antwerpen: Intersentia & Institute for Human Rights, 2006) 345-503, at 469.

Conversely, collectivity based-rights reflect a symbolic, as opposed to individual, approach which goes beyond individual victims' rights and interests, providing recognition to victims not only as injured individuals, but also as members of a community which has also been injured by the violations at issue. Collectivity-based rights generally belong to the category of satisfaction, and may include official apologies and acknowledgments of responsibility, commemorations and tributes as well as accountability of perpetrators.

Plainly, individual-based rights are hard to conceive and realise in a context of mass-victimisation. In these circumstances a collective approach seems often more realistic. An effective realisation of victims' rights may only be achieved by identifying the group of right-holders on the basis of the specific right they are entitled to and to the impact of this right on the proceedings. This task is facilitated by the fact that the constitutive elements of the concept of victim are left undefined and the relevant bodies are largely free to develop their interpretation of the concept on a case-by-case basis in order to deal with potential imbalances and to model the procedures according to different priorities.

The case-by-case approach, which has thus far been adopted across the international legal order, should not, however, lead to the complete unpredictability of the interpretation of the concept. Rather, international bodies that have jurisdiction over individual claims shall work at the elaboration of a *functional* and *coherent* interpretation of the concept itself. This means that the definition of the victim should be interpreted according to the various contexts, and to which rights are conditioned upon the qualification as victim.

Arguably, the concept of victim may be seen as a matryoshka doll, encompassing all victims of a crime, regardless of the rights granted to them. The proposed *functional* interpretation requires the judges to identify, within the criteria set out by the relevant rules, differently sized groups of victims (from an over-inclusive group to progressively smaller ones) for the purpose of exercising rights in different phases of the proceedings.

Elements of this functional approach can be identified in the practice of both human rights supervisory bodies and international criminal proceedings. One may think, for instance, of the distinction made by the IACtHR between the 'victims' of a violation, and a broader category of individuals defined as 'injured persons' who also sustained harm as a result of the violation at issue. In this situation only a restricted category of individuals (the victims as narrowly defined) has a right to *locus standi in judicio* before the Court. This does not, however, deprive other persons otherwise harmed by the violation (a wider group of persons) from being granted the 'injured party' status and, in principle, being entitled to reparations. A functional approach has also been adopted by international and internationalized criminal

tribunals where, as discussed above, the concept of victim-participant is potentially narrower than the concept of victim entitled to reparation.

The approach adopted so far at the international level seems, therefore, to support an interpretation of the concept of victim in accordance with which rights are conditioned upon victim status.¹⁶² Consequently, at least two definitions of victim can be distinguished (i) the victim as the person against whom the violation was committed, and (ii) the victim as the person who suffered harm as a result of the violation. The first element of the definition relates to those persons who directly suffered from the commission of a crime. This group includes the direct victims of a crime (primary victims) and their next of kin (secondary victims) when the direct victims are deceased or otherwise unable to apply before the Court. This narrow category has been generally granted individual-based rights.

The second element of the suggested definition, broad in nature and scope, may instead be used to identify all those persons who have been harmed to different degrees as a consequence of the crime (primary, secondary and tertiary victims). It is clear that this expansive concept should be used only in contexts where the number of persons granted victim status does not encroach on others' rights and priorities. For example, at least in principle, it does not seem excessively burdensome to grant this potentially large group of individuals access to measures of reparation, when collective forms of reparation are at stake, and more generally collective-based rights.

¹⁶² Note that during the negotiations for the Rome Statute, the Spanish delegation proposed a notion of victim very similar to the interpretation here suggested. The proposal, eventually rejected by the drafters, suggested that a larger group along the lines of the proposed definition in the UN 1985 Declaration would be considered for purposes of protection and assistance, as well as for claiming reparations, while a much reduced group would be regarded as victims for the purposes of participation in the proceedings. S. Fernández de Gurmendi, 'Definition of Victims and General Principle', *supra* note no. 89, at 431.

6 CONCLUDING REMARKS

Despite the specific differences referred to throughout the Chapter, a broad concept of victim, identified as the person who has been harmed either directly, indirectly or collectively by an internationally unlawful act is gradually emerging in international law. However, no agreement seems to have been reached on how the constituent elements of the concept of victim, particularly the concept of harm and the causal nexus requirement have to be interpreted and a case-by-case approach has thus far been adopted in the case law of international courts and tribunals.

A problem may arise when this definition is to be applied to identify right-holders. Here, a case-by-case approach may prove unfair, especially when it may lead to substantial disparity of treatment among victims.¹⁶³ On the other hand, both broad and narrow interpretations of the concept have their drawbacks: a broad interpretation may prove simply unworkable and potentially unfair towards the accused and a restrictive interpretation may eventually entail a denial of justice for persons who were nevertheless harmed by the violations at stake, prejudicing the restorative mandate of international criminal tribunals.

It is undisputed that the adoption from the outset of a less ambiguous definition of victim within the governing rules of the courts under examination would have been more desirable. However, every cloud has a silver lining.

The lack of clarity regarding the definitions of victims eventually adopted by the courts under examination offers the judges the opportunity, through their interpretation, to balance the competing objectives of human rights protection and international criminal justice. In order to do so, it was suggested earlier in the Chapter that the courts adopt a *functional* interpretation of the definition of victim. In other words, they should interpret it according to the various contexts, and to which rights are conditioned upon qualification as victim.

In particular, a *twofold concept of victim* has been advanced, identifying two distinct groups of victims. On the one hand, a narrow concept, which includes those individuals entitled to exercise an enhanced procedural position, where fairness or efficiency concerns demand the reduction of the number of individuals eligible to the victim status. This is, for example, the case when victims are able to participate in legal proceedings in their own right such as before the regional human rights courts and international criminal tribunals we have

¹⁶³ War Crimes Research Office, Washington College of Law, *Victims Participation Before the International Criminal Court* (December 2007), available online at http://www.wcl.american.edu/warcrimes/documents/12-2007_Victim_Participation_Before_the_ICC.pdf?rd=1 (last visited on 26 June 2013), at 57-58.

examined. Plainly, individual participation, including the right to submit observations and evidence, may prove to be simply unfeasible in cases of widespread violations such as those resulting from an armed conflict. On the other hand, a broader concept of victim, including a wider community of victims, has been proposed for the exercise of collectivity-based rights such as collective and symbolic reparations. All in all, when dealing with victims' rights, courts should seek to elaborate a precise and regime-specific definition of the victim in relation to the rights and duties associated with this legal status.

It may be claimed that the adoption of a functional interpretation of victim eventually frustrates victims' concerns, addressing them only to the extent that they serve the exigencies of the regime where they seek rights. However, this is not necessarily the case. Prioritising the rights of a first circle of victims, those who most suffered from the commission of a crime, does not mean instrumentalizing their concerns. The rationale under the proposed method of interpretation is, rather, to safeguard the effective realisation of victims' rights, as well as of the mandate of the international bodies which recognise such rights.

As will be further developed in the following chapters, victims' interests need to be weighed against other objectives and imperatives of human rights regimes and of international criminal justice. The fact that not all the victims of a violation play an active role within the proceedings is a limit which scholars need to accept as a sort of 'genetic drawback' of mass victimisation. Arguably, the proposed method of interpretation permits the range of beneficiaries which are entitled to a set of core rights to be maximized, while limiting their impact on the other objectives. Only by doing so will the difficult task of reconciling an effective recognition of a victims' right to justice with the manageability, effectiveness and fairness of the proceedings be realised.

Chapter III

No Redress without (Criminal) Justice: An Emerging Right to Justice for Victims of Gross Violations of Human Rights and International Crimes

1 INTRODUCTION

Chapter I illustrated how a distinct redress regime has emerged for victims of gross human rights violations. The assumption that the most obvious need for victims is for compensation has been increasingly challenged and a ‘return to a symbolic dimension’¹ has been recommended instead. Accordingly, human rights supervisory bodies have increasingly directed states to take specific action other than restitution or compensation to remedy gross human rights violations.

This Chapter will focus on one specific measure that is emerging as an imperative component of reparation for victims of gross violations of human rights, namely the prosecution of those responsible for the violations. The existence of a link between prosecution of human rights offenders and victims’ reparation was acknowledged twenty years ago by Theo Van Boven who observed that:

It cannot be ignored that a clear nexus exists between the impunity of perpetrators of gross violations of human rights and the failure to provide just and adequate reparation to the victims and their families or dependents.²

Likewise, the General Assembly of the United Nations emphasised that ‘the accountability of individual perpetrators of grave human rights violations is one of the central elements of any effective remedy for victims of human rights violations and a key factor in ensuring a fair and equitable justice system and, ultimately, reconciliation and stability within a State.’³

In describing a torture victim, Chilean novelist Isabel Allende referred to a person who ‘wants her suffering to be acknowledged, she needs an apology, she demands that the

¹ M. Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998), at 110.

² Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final report submitted by Mr. Theo van Boven*, UN Doc. E/CN.4/Sub.2/1993/8, 2 July 1993, § 126.

³ UN GA, *Khmer Rouge Trials*, UN Doc. A/Res/57/228, 27 February 2003.

criminals face trial. Otherwise, how could she start healing?’⁴ A growing literature on impunity for gross violations of human rights, both from a psychological and a legal perspective, supports the view that prosecuting perpetrators alleviates the suffering of victims.⁵ While criminal courts cannot provide individual rehabilitation *per se*, they do reinforce societal healing.⁶ Moreover, certain aspects of the judicial process, when performed effectively, may provide victims with closure and healing.⁷

The deleterious effects of impunity on survivors has been the object of a vast literature in psychiatry and psychology. The authors, mostly therapists that have provided support to torture victims, have often argued that the absence of trials, guilty verdicts or punishment was itself psychologically harmful. For instance, Inge Genefke, the Secretary General of the International Rehabilitation Council for Torture Victims described impunity as a ‘tangible continuing injury... an impediment to the individual’s and society’s healing process’.⁸

A number of legal scholars have also contended that justice can moderate a victims’ desire for revenge and foster respect for democratic institutions. For instance, Antonio Cassese, the first president of the ICTY observed:

[J]ustice dissipates the call for revenge, because when the Court metes out the perpetrator his just deserts, then the victims’ calls for retribution are met; by dint of dispensation of justice, victims are prepared to be reconciled with their erstwhile tormentors, because they know that the latter have now paid for their crimes.⁹

It is argued that the awareness that justice matters to victims has brought to a gradual reconsideration of the types of remedies that victims of certain serious violations should be granted. Recent human rights practice and jurisprudence appear to increasingly support the view that the identification, the prosecution of wrongdoers is an imperative remedy in the aftermath of gross violations of human rights. A crucial shift in rationale is implied in this emerging trend. Indeed, while the prosecution of human rights offenders has traditionally

⁴ I. Allende, ‘Impunity’, text presented at the UN International Day in Support of Victims of Torture, 26 June 1999, cited in J. O’Connell, ‘Gambling with the Psyche: Does Prosecuting Human Rights Offenders Console Their Victims?’ 46 *Harvard International Law Journal* (2005) 295-345, at 318.

⁵ For a thorough analysis of the psychological effects on criminal prosecutions on victims, see J. O’Connell, ‘Gambling with the Psyche: Does Prosecuting Human Rights Offenders Console Their Victims?’, *supra* note no. 4; R. Aldana-Pindell, ‘In Vindication of Justiciable Victims’ Right to Truth and Justice for State-sponsored Crimes’ 35 *Vanderbilt Journal of International Law* (2002) 1399-1502.

⁶ Y. Danieli, ‘Reappraising the Nuremberg Trials and Their Legacy: The Role of Victims in International Law’, 27 *Cardozo Law Review* (2006) 1633-1649, at 1640.

⁷ This aspect is explored in more depth in Chapter V in relation to victims of international crimes.

⁸ I. Genefke, ‘Statement on United Nations International Day in Support of Victims of Torture’, 26 June 1999, cited in E. Stover, *The Witness: War Crimes and the Promise of Justice in The Hague* (Philadelphia: University of Pennsylvania Press, 2005), at 12.

⁹ A. Cassese, ‘Reflections on International Criminal Justice’, 61 *Modern Law Review* (1998) 1-10, at 6.

been considered a measure of general human rights protection, it is now also called for in the interest of the individual victims.¹⁰ The framing of criminal justice as a victim's right raises a number of theoretical questions that will need to be addressed throughout this Chapter, particularly in respect to the relationship between the emerging right to justice and the states' duty to prosecute.

To this end, this Chapter is divided into two parts: (i) the first part analyses the traditional rationales that support a duty to prosecute and punish international crimes and gross human rights violations; (ii) the second part considers the affirmation of a right to criminal justice as an integral component of the right to remedy for victims of gross human rights violations.

¹⁰ See e.g. A. Eide, 'Preventing Impunity for the Violator and Ensuring Remedies for the Victim' 69 *Nordic Journal of International Law* (2000) 1-10; T. Van Boven, 'Accountability for International Crimes: The Victim's Perspective', in C. Joyner (ed.), *Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings of the Siracusa Conference 17-21 September 1998* (Toulouse: Érès, 1998) 349-357, at 353.

2 THE DUTY TO PROSECUTE AND ITS LEGAL RATIONALE

Confronting gross human rights violations is a much more difficult endeavour than confronting ordinary crime due to the high number of perpetrators and victims as well as the complexity of the task of assessing allegations of wrongful acts and determining responsibility for wrongdoing. The instruments designed to deal with gross human rights violations have been various, ranging from the creation of international tribunals (when these violations amount to international crimes), to the initiation of domestic trials, administrative proceedings and general amnesties.

In this regard, however, it has been rightly observed that '[s]ilence and impunity have been the norm rather than the exception'.¹¹ The prevalence of impunity over accountability in the aftermath of gross violations of human rights may be attributed to two main interrelated factors. The first is that traditionally accountability for human rights violations fell into the 'domaine réservé' of the state concerned. According to the traditional Grotian model of public international law, the sovereignty of states covered the acts of a state against its own citizens, regardless of the lawfulness of such acts.¹² Secondly, in the absence of a specific obligation to prosecute and punish those responsible for gross human rights violations, states have often opted for alternative solutions to criminal trials with a view to stopping the violations (if these are still ongoing) or avoiding the risk of provoking further violence.¹³

However, since the end of World War II, in the wake of widespread revulsion against the crimes committed during the conflict, states finally began to accept limits on their sovereignty in relation to the human rights of those individuals subject to their jurisdiction. Since then, the duty of states to prosecute certain serious crimes has gradually become settled law. Over the last three decades, international law and policy have shown growing support for the principle 'that the most serious crimes of concern to the international community as a whole must not go unpunished'.¹⁴ Two elements, in particular, signal the increasing support for a state's obligation to investigate and prosecute violations of personal integrity and take action against those responsible: (i) the adoption of treaties explicitly providing for the obligation of states to prosecute and punish perpetrators of acts defined as crimes under

¹¹ C. Nino, *Radical Evil on Trial* (New Haven: Yale University Press, 1996), at 3.

¹² On this issue, see K. Ambos, 'Judicial Accountability of Perpetrators of Human Rights Violations and the Role of Victims', *International Peacekeeping* (March 2000 – June 2000), 67-77, at 67.

¹³ For a global perspective on the use of criminal prosecution in the aftermath of gross violations, see C. Nino, *supra* note 11, at 3-40. See also D. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', 100 *Yale Journal of International Law* (1991) 2537-2615.

¹⁴ Preamble, Rome Statute of the International Criminal Court ('ICCSt.')

international law; and (ii) the interpretation by human rights supervisory bodies of the obligation to ‘respect and ensure’ rights as entailing the duty to prosecute those responsible for gross violations of human rights.

Examples of universal treaties demanding the criminalisation and punishment of certain gross human rights offenses are the Convention on the Prevention and Punishment of the Crime of Genocide, the Geneva Conventions of 1949 and the Additional Protocol I of 1977, the Convention against Torture and Other Cruel or Degrading Treatment or Punishment, the Convention to Suppress Slavery and Slavery Trade, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, the International Convention on the Suppression and Punishment of the Crime of Apartheid, the Hostage Convention and the Convention on the Suppression of Unlawful Acts against the Safety of Civil Aviation. At the regional level, mention can be made to the Inter-American Convention to Prevent and Punish Torture and the Inter-American Convention on Forced Disappearance.

Those instruments impose on states the obligation to investigate, prosecute and punish those suspected or charged with the relevant crimes. It is clear that these treaties are only binding on states party to them and, moreover, only cover crimes of a particularly serious nature such as torture, genocide, slavery and apartheid. As such, the question arises as to whether a duty to prosecute also extends to other human rights violations, particularly the most serious ones, such as extrajudicial killings and forced disappearances.

Notably, most human rights conventions are silent regarding the duty to prosecute and punish human rights violations. However, authoritative interpretations of broad human rights treaties hold that states parties fail to ‘ensure and respect’ certain individuals’ rights if they do not affirmatively investigate and prosecute those responsible for the violations of such rights. The ‘respect and ensure’ provisions can be found in a number of human rights treaties including the International Covenant on Civil and Political Rights (‘ICCPR’), the American Convention on Human Rights (‘ACHR’), and the European Convention on Human Rights (‘ECHR’).¹⁵ While for a long time it was assumed that states enjoyed a certain margin of discretion in determining the appropriate measures on how to fulfil the obligation to respect and ensure human rights, a review of the practice of human rights supervisory bodies indicates that a set of core fundamental rights – the right to life and the right to be free from

¹⁵ Art. 2(1) ICCPR; Art. 1 ACHR; Art. 1 ECHR.

torture and inhuman and degrading treatments - demand special protection and require states to prosecute those allegedly responsible for those violations.¹⁶

An analysis of the interpretation of the ‘respect and ensure’ norms by these bodies indicates that the rationale for conceiving the duty to prosecute as a measure of human rights protection is twofold: (i) on the one hand, prosecution is deemed necessary to prevent further violations of human rights; (ii) on the other, it has been argued that the failure to prosecute may be considered as a form of complicity in the crime. As such, prosecution is necessary to re-establish respect for the norm violated and individual and societal trust in the rule of law.

2.1 Prosecution as a Measure to Prevent Further Human Rights Abuses

The idea that the prosecution of certain serious violations is required in order to effectively protect human rights has been supported by a large number of international institutions. In particular, the Human Rights Committee (‘HRC’), the European Court of Human Rights (‘ECtHR’) and the Inter-American Court of Human Rights (‘IACtHR’) have elaborated a considerable jurisprudence on this issue. A separate analysis of the three bodies is thus necessary.

2.1.1 The Human Rights Committee

The Human Rights Committee has generally referred to the first two paragraphs of Article 2 of the ICCPR as the legal basis for the duty to punish those responsible for serious human rights violations. Paragraph 1 of Article 2 obliges states to ‘respect and ensure’ the rights recognised in the Covenant. Reference to this provision is based on the idea that impunity threatens respect for human rights. A state of impunity, according to the Committee, ‘encourages further violations of Covenant rights’.¹⁷ The punishment of offences is therefore required primarily because of its deterrent effect, with a view to preventing further human rights violations. From this perspective, prosecution is also deemed necessary for the re-establishment of peace in societies emerging from conflict. This position was taken by the

¹⁶ D. Orentlicher, ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’, *supra* note no. 13, at 2540-2541.

¹⁷ HRC, *Comments on Nigeria*, UN Doc. CCPR/C/79/Add.65, 24 July 1996, § 32. In *Hugo Rodríguez v. Uruguay* the Committee noted with concern that impunity may give rise to further grave human rights violations. *Hugo Rodríguez v. Uruguay* (Comm. No. 322/1988), UN Doc. CCPR/C/51/D/322/1988, 19 July 1994, § 2.4.

Committee in a comment on Burundi, for instance, in which it defined impunity as an ‘obstacle to the restoration of lasting peace.’¹⁸

Aside from the obligation to respect and ensure Covenant rights the Committee has also referred to the duty to ‘give effect’ to the rights in the Covenant pursuant to Article 2(2) as a legal basis for its call for prosecution. For example, in its Comments on Colombia of 1997 the Government was urged to adopt punitive measures against acts of child murder to ensure full implementation of Article 24 (relating to child rights).¹⁹ Similarly, the Committee recommended in the case of Yemen ‘that the State party endeavour to bring to justice perpetrators of human rights abuses, in accordance with article 2(2) of the Covenant.’²⁰

The obligation to prosecute has consequently been interpreted as an instrument of deterrence and general protection of human rights which is not only related to the victims of the violation but rather to society as a whole. Accordingly, no corresponding individual right to prosecution has been derived from the provisions mentioned above.

2.1.2 *The European Court of Human Rights*

Like its universal counterpart the practice of the European Court of Human Rights is based on the concept that the protection of human rights requires that perpetrators of serious human rights violations be brought to justice. A review of the Court’s case law reveals that the enactment and enforcement of criminal law are currently seen as measures designed to ensure the right to life and the effective enjoyment of other human rights. An obligation to prosecute as such is, however, confined to the most serious violations of human rights, notably the right to life and the prohibition of torture. As such, criminal prosecution is considered to be a matter of implementing the right to life or the right to physical integrity required by Articles 2 and 3 of the Convention respectively, read in conjunction with the obligation to secure human rights under Article 1.

The Court has specified in a number of judgments the reasons why criminal prosecution is necessary for human rights protection. First, as it has affirmed in a number of cases, deterrence is a primary reason for the duty to criminalise and prosecute serious abuses. The preventive aspect of criminal law thus not only demands the criminalisation of certain conduct, but also ‘a law enforcement machinery for the prevention, suppression and

¹⁸ HRC, *Comments on Burundi*, UN Doc. CCPR/C/79/Add.41, 3 August 1994, § 4.

¹⁹ HRC, *Concluding Observations on Colombia*, UN Doc. CCPR/C/79/Add.75, 5 May 1997, § 42.

²⁰ HRC, *Comments on Yemen*, UN Doc. CCPR/C/79/Add.51, 3 October 1995, § 19.

punishment²¹ of such conduct. By prosecuting serious human rights violations States parties seek to prevent the commission of further crimes. On the contrary, a climate of impunity would give rise to further violations. In other words, if perpetrators are able to commit abuses without being held accountable the protection of rights is rendered ineffective.

Second, the Court has considered criminal prosecution as a necessary measure to protect the rule of law. In a recent case, *Öneryildiz v. Turkey*, a Grand Chamber held that:

[T]he national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished. This is essential for maintaining public confidence and ensuring adherence to the rule of law and for preventing any appearance of tolerance of or collusion in unlawful acts [...].²²

Apart from restoring rule of law, criminal prosecution also re-establishes public confidence in the use of force by the state.²³ All these reasons show that the obligation to prosecute is generally concerned with general human rights protection as a shared interest of society and not as an individual right of the victim even though these statements have been made in the context of individual complaints. In this respect, it has been argued that in recent cases the Court has increasingly called on states to adopt not only measures concerning the individual victim but also general measures of human rights protection with a view to managing its increasing caseload.²⁴ From a different perspective, however, the fact that the Court has called upon state parties to ensure criminal justice when dealing with individual complaints (and not only in inter-state cases) may also be read as a first step towards a general affirmation of an individual right to justice.

2.1.3 *The Inter-American Court of Human Rights*

The Inter-American Court of Human Rights has developed an ample jurisprudence on how States parties to the American Convention ought to react to serious human rights violations and which form of accountability is required. In particular, the Inter-American Court has long

²¹ ECtHR, *Kontrová v. Slovakia* (App. No. 7510/04), Judgment (Merits and Just Satisfaction), 31 May 2007, § 49 (relating to breaches of Art. 2 ECHR (right to life)); in relation to breaches of Art. 3 ECHR (Prohibition of torture, inhuman or degrading treatments), see *Okkali v. Turkey* (App. No. 52067/99), Judgment (Merits and Just Satisfaction), 17 October 2006, § 65.

²² ECtHR, *Öneryildiz v. Turkey* (App. No. 48939/99), Judgment (Merits and Just Satisfaction), 30 November 2004, §§ 95-96.

²³ ECtHR, *Ramsahai and Others v. The Netherlands* (App. No. 52391/99), Judgment (Merits and Just Satisfaction), 15 May 2007, § 325.

²⁴ A. Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (Oxford: Oxford University Press, 2009), at 119.

established that states are under a duty to prosecute those responsible for gross violations of human rights and, to that end, it has traditionally indicated as the legal basis for such an obligation the provision on the need to ‘respect and ensure’ rights, stipulated in Article 1(1) of the American Convention of Human Rights.

The Inter-American Court of Human Rights elaborated on the content of this provision in the 1988 *Velásquez Rodríguez* decision.²⁵ The case concerned the arrest, torture, and execution of a Honduran student activist by the Honduran military. The Court found Honduras responsible for violating a number of substantive rights including the rights to life, physical integrity and personal liberty. Most importantly, it found that Honduras had also breached the general obligation of Article 1(1) of the ACHR to ensure these rights. In this respect, the Court asserted that the obligation of article 1 to ‘ensure’ rights places a positive obligation on the states parties to ‘organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights.’²⁶ Accordingly, the Court added:

The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, impose the appropriate punishment and ensure the victim adequate compensation.²⁷

The Court has repeatedly emphasised the seriousness of the obligation to prosecute human rights violations. In the case of *Serrano-Cruz Sisters v. El Salvador*, concerning the forced disappearance of two children, the Court held that ‘[w]henver there has been a human rights violation, the State has a duty to investigate the facts and punish those responsible ... and this obligation must be complied with in a serious manner and not as a mere formality.’²⁸

This approach has been further elaborated in subsequent cases in which the Court has emphasised that by complying with the duty to investigate, prosecute and punish, states combat impunity and deter future repetition. For example, in *Paniagua Morales* the Court held that the situation of impunity in Guatemala violated the general obligation to protect and to ensure the exercise of rights. In particular, the Court found that:

[T]he total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention, in view of the fact that the State has the obligation to use all

²⁵ IACtHR, *Velásquez Rodríguez v. Honduras*, Judgment (Merits), 29 July 1988.

²⁶ *Ibid.*, § 166.

²⁷ *Ibid.*, § 174.

²⁸ IACtHR, *Serrano-Cruz Sisters v. El Salvador*, Judgment (Merits, Reparations and Costs), 1 March 2005, § 168.

the legal means at its disposal to combat that situation ... fosters chronic recidivism of human rights violations, and total defenselessness of victims and their relatives.²⁹

In a similar vein, the Court has also emphasised the connection between the duty to prosecute and the rehabilitation of the society which has been affected by mass atrocities. In the aforementioned *Serrano* case, the Court noted that by providing a full account of the events surrounding the violations, justice benefits ‘the society as a whole, because, by knowing the truth about such crimes, they can be prevented in the future.’³⁰ Indeed, if the society is made aware of the heinous character of the atrocities that have occurred and of the fact that perpetrators did not escape justice there is little chance that these atrocities will occur again. As has been correctly noted, ‘[b]y forcing society to confront these evils, the Court has helped prevent future human rights violations.’³¹

Similarly, according to the Inter-American Commission of Human Rights (‘IACoHR’), impunity and the commission of serious human rights abuses are deeply interconnected.³² Impunity, in the view of the Commission, causes a vicious circle that tends to be perpetuated, thereby increasing the number of violations. Not only does a climate of impunity not deter potential perpetrators, the lack of justice may in fact result in people taking justice into their own hands, giving rise to further human rights violations.³³

The reasoning of the Inter-American institutions shows that investigation and punishment are considered as measures to ensure that all persons are able to enjoy the rights of the Convention since prosecution is required in order to prevent the commission of further crimes. Such statements, considering prosecution as a means to ensure human rights pursuant to Article 1 of the Convention, resemble the Human Rights Committee’s and the European Court of Human Rights’ interpretation of the equivalent ‘respect and ensure’ provisions. This rationale has led the Inter-American institutions to criticise any large-scale impunity, as will be further analysed in Chapter IV.

²⁹ IACtHR, *Paniagua Morales et al. v. Guatemala*, Judgment (Merits), 8 March 1998, § 173.

³⁰ IACtHR, *Serrano-Cruz Sisters v. El Salvador*, supra note no. 28, § 169.

³¹ B. Mayeux and J. Mirabal, ‘Collective and Moral Reparations in the Inter-American Court of Human Rights’, Human Rights Clinic, The University of Texas School of Law, November 2009, at 18, available online at http://www.utexas.edu/law/clinics/humanrights/work/HRC_F09_CollectiveReparations.pdf (last visited on 10 June 2013).

³² IACoHR, *Second Report on the Situation of Human Rights in Peru*, 2 June 2000, § 206.

³³ IACoHR, *Third Report on the Situation of Human Rights in Paraguay*, 9 March 2001, Chapter III, ‘Impunity’, § 9.

2.2 Prosecution as a Measure to Retrospectively Protect Substantive Human Rights

Apart from having a preventative aim, prosecution of human rights offenders has also been considered as a measure to protect the individual victim. From this perspective, prosecution is not (only) seen as an instrument to deter further violations but to avoid the retroactive complicity of the state. As Fletcher has argued:

The relevant point today is that we see the failure to punish as a form of complicity that falls on those who abandon the victim to his or her 'private' tragedy. When society and its officials look the other way, their indifference exacerbates the original crime. The victim suffers twice, first from the crime itself and second from the sense of being abandoned by the society that is supposed to condemn the crime.³⁴

Indeed, the failure to sanction human rights violations could be considered as a form of retroactively aiding and abetting those responsible of the violations. In this way, the failure to take criminal measures may amount to a violation of a substantive individual right.³⁵

This rationale has been explained by the Human Rights Committee in its *General Comment No. 31*:

There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts.³⁶

The retrospective protection rationale is also well established in the practice of the Inter-American Court of Human Rights and of the European Court of Human Rights. In the *Velásquez Rodríguez* case, the IACtHR required Honduras to prosecute the offenders to ensure the victim 'the free and full exercise of his human rights.'³⁷ According to the Court's reasoning, investigation and prosecution are measures aimed at securing victim's rights. In other words, prosecution is considered, similar to the position taken by the Human Rights Committee, as a form of retrospective protection owed to the individual victim. This was made clear by the Court when it stressed that:

³⁴ G.P. Fletcher, *The Grammar of Criminal Law: American Comparative and International*, vol. I: Foundations (Oxford: Oxford University Press, 2007), at 258.

³⁵ See on this issue, C.A.E. Bakker, *Towards the Effective Prosecution of International Crimes: Evolving Norms and State Practice in Argentina, Chile and Peru* (Florence: European University Institute, 2006).

³⁶ *General Comment no. 31, The Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 26 May 2004, § 8.

³⁷ *Velásquez Rodríguez v. Honduras*, *supra* note no. 25, § 166.

Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.³⁸

Therefore, even if this failure is not the primary cause of the abuse suffered by the victim, it is considered as a form of retrospective acquiescence. Accordingly, prosecution and punishment are regarded as a measure to re-establish respect for the victims' violated rights. From this point of view, the rationale of prosecution extends beyond prevention and general human rights protection, acquiring aspects which are more akin to the concept of remedy. As will be argued in the next section, the retrospective protection rationale has in fact been gradually substituted by reference to remedial rights of victims.

As stated above, the European Court of Human Rights has also adopted the retrospective protection rationale. The assumption of a duty to investigate has been seen not only as a primary measure of general human rights protection but also as deriving from the infringed substantive right. In particular, the Court has referred to this duty as the 'procedural limb' of individual rights.³⁹ Consequently, every victim of gross human rights violations is entitled to a criminal investigation. The Court explained this in the case *Kaya v. Turkey*:

The obligation to protect the right to life under art. 2, read in conjunction with the State's general duty under art. 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms in Convention", requires by implication that there should be some form of effective official investigation.⁴⁰

Although this statement would appear to be limited to reaffirming the idea of deriving positive obligations from the duty to respect and ensure conventional rights, the Court goes beyond this. Indeed, positive obligations have been traditionally limited to measures of prevention. As a matter of fact, a criminal investigation is not preventative in the sense that 'it cannot make the crime non-existent'.⁴¹ Therefore, call for investigation can only be explained by referring also to the need to retrospectively secure the right of the victim. As such an investigation is *de facto* 'remedial in nature'.⁴² This legal reasoning has parallels with the jurisprudence of the Inter-American Court of Human Rights and the Human Rights Committee.

³⁸ *Ibid.*, § 177.

³⁹ See e.g., ECtHR, *Calvelli and Ciglio v. Italy* (App. No. 32967/96), Judgment (Merits), 17 January 2002, § 49; *Šilih v. Slovenia* (App. No. 71463/01), Judgment (Merits and Just Satisfaction), 9 April 2009, §§ 192-196 and the case law cited therein.

⁴⁰ ECtHR, *Kaya v. Turkey* (App. No. 22729/93), Judgment (Merits and Just Satisfaction), 19 February 1998, § 86.

⁴¹ A. Seibert-Fohr, *Prosecuting Serious Human Rights Violations*, *supra* note no. 24, at 128.

⁴² *Ibid.*

On the whole, investigation and prosecution are consequently regarded as measures to secure the victims' substantive rights and not only to ensure general human rights protection. Arguably, the retrospective protection rationale, which expanded primary protection of individual rights to remedial measures, has paved the way for the progressive affirmation of criminal prosecution as a form of remedy, as the next section shall illustrate.

3 THE AFFIRMATION OF CRIMINAL JUSTICE AS AN INTEGRAL COMPONENT OF THE RIGHT TO REMEDY FOR VICTIMS OF GROSS HUMAN RIGHTS VIOLATIONS

3.1 Some Preliminary Remarks

As the sections above have shown, the duty to prosecute serious human rights violations has been traditionally framed as an objective duty of general human rights protection. The fulcrum of the case for criminal prosecution is that it is the most effective insurance against future violations: the failure to prosecute and punish human rights violations may result in the insufficient protection of further abuses.⁴³ Besides the preventative rationale, human rights supervisory bodies have also adopted the view that criminal law measures may serve as retrospective protection of substantial individual rights. From this perspective, in the previous sections it has been argued that if criminal measures are required to ensure an individual right, their rationale is not preventative, but rather remedial. However, until recently, these bodies have not set out an individual right to claim such measures. In other words, individuals have not been granted a right against the state to bring the perpetrators to justice based on the state's obligation to prosecute gross violations of human rights.⁴⁴

For instance, in a number of views on individual communications, the Human Rights Committee has held that there is no individual right to see one's abuser criminally prosecuted.⁴⁵ In a similar vein, the Inter-American Court of Human Rights, when ordering the remedy in the above-mentioned *Velásquez Rodríguez* case, was hesitant in ordering the measure that would seem to be implied by the language of its judgment. At the remedy stage the Court ordered only monetary compensation, while lawyers for the victims' families, the Inter-American Commission, and a group of international law experts acting as *amici curiae* had asked the Court for much broader reparative measures including an injunction requiring Honduras to prosecute criminally those responsible for disappearances.⁴⁶

Nonetheless, as mentioned above, the adoption of the retrospective protection rationale instead of the general human rights protection rationale has paved the way for the gradual affirmation of the remedial function of criminal measures. As the next sections will

⁴³ M. C. Bassiouni, 'Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights', in *Idem* (ed.) *Post-Conflict Justice* (Ardsley, NY: Transnational Publishers, 2002), 3-54, at 52.

⁴⁴ A. Seibert-Fohr, *Prosecuting Serious Human Rights Violations*, *supra* note no. 24, at 190-193.

⁴⁵ HRC, *H.C.M.A. v. the Netherlands* (Comm. No. 213/1986), UN Doc. CCPR/C/35/D/213/1986, 30 March 1989, § 11.6; *S.E. v. Argentina* (Comm. No. 275/1988), UN Doc. CCPR/C/WG/36/DR/275/1988, 26 March 1990, § 5.5; *R.A., V.N. et al. v. Argentina* (Comm. Nos. 343, 344 and 345/1988), UN Doc. CCPR/C/38/D/343/1988, 26 March 1990, § 5.5.

⁴⁶ IACtHR, *Velásquez Rodríguez v. Honduras*, Judgment (Reparation and Costs), 21 July 1989, § 9.

attempt to demonstrate, this has led to the affirmation of criminal justice as an integral component of the right to remedy for victims of gross human rights violations.

In particular, the decisions of treaty-based human rights tribunals and provisions in binding and non-binding international human rights documents highlight that for victims of violations of the right to life and personal integrity (such as in cases involving arbitrary detentions, forced disappearances, torture and extrajudicial executions) prosecution of the offenders is necessary to make the remedy effective.⁴⁷ In this way, states not only have a duty to the public but also to the victims to prosecute grave human rights abuses. As such, the development of this practice supports the emergence of a victims' right to justice for serious human rights violations which coexists with the relevant state's duty to prosecute.

It must be clarified at the outset that with the assumption of a right to justice as an integral component of victims' right to remedy it is not suggested here that criminal justice alone can suture the lesions of individual and collective trauma. For survivors of gross violations of human rights, the idea of justice may encompass more than criminal trials. It means return of stolen property, locating and identifying the bodies of the missing, securing reparations and apologies and helping those traumatised by atrocities to recover.⁴⁸ As evidenced in Chapter I, reparation for victims of gross human rights violations entails a number of measures both pecuniary and non-pecuniary. What is argued here is that criminal measures are emerging as a component of reparation, which is to be granted to victims *cumulatively* (i.e., not *alternatively*) with other measures, of pecuniary and non-pecuniary character. Nonetheless, it will also be argued that criminal justice cannot be replaced by alternative remedies in certain circumstances.

Furthermore, although criminal prosecution is considered as a victims' right, victims cannot renounce it by asking, for example, that no action is taken against the alleged offenders. This is so for three main reasons. First, in cases of serious human rights violations states are under a multidimensional obligation that entails not only the duty to provide reparation, but also the duty to prosecute those responsible for the violations. These duties are complementary and not alternative. As the Special Rapporteur on extra-judicial, summary and arbitrary executions wrote:

⁴⁷ I expand on these ideas in V. Spiga, 'No Redress without Justice: Victims and International Criminal Law', 10 *Journal of International Criminal Justice* (2012) 1377-1394, at 1381-1384.

⁴⁸ E. Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (Philadelphia: University of Pennsylvania Press, 2005).

Granting compensation presupposes compliance with the obligation to carry out an investigation of human rights abuses with a view to identifying and prosecuting their perpetrators. Financial or other compensation before such investigations are initiated or concluded, however, does not exempt Governments from this obligation.⁴⁹

Second, certain obligations of the state, like the duty to prosecute, are unconditional, in the sense that they do not depend on an individual complaint and, consequently, they cannot be renounced by victims. Therefore, while victims can forfeit the reparation to which they have right, the state is not exempted from its duty to investigate gross human rights violations and bring to justice those responsible for them. As observed above, while criminal justice is emerging as an individual right, it is also a duty that states owe to the society as a whole.

Finally, the different measures of reparation are not alternative but complementary. As indicated in Article 34 of the Draft Articles on State Responsibility, full reparation shall take the form of restitution, compensation, and satisfaction, ‘either singly or in combination’.⁵⁰ As noted in Chapter I, reparation may vary according to the concrete circumstances of the case and the nature of the norm violated. However, when certain measures are deemed as adequate to afford relief for the harm suffered they cannot be replaced by other measures. For instance, as I shall demonstrate in this Chapter, if criminal prosecution is considered as an adequate remedy in cases of gross human rights violations, it cannot be replaced by administrative proceedings or disciplinary measures.

The following sections will discuss how criminal prosecution has been progressively affirmed as an imperative component of the right to remedy in cases of gross violations of human rights, focusing on: (i) international legal instruments establishing a right to justice as a remedy for victims of gross human rights violations, and (ii) the practice of human rights supervisory bodies. Before doing so, it is necessary to address, however briefly, the relationship between criminal measures and the concept of reparation as traditionally used in international law.

⁴⁹ Commission on Human Rights, *Question of the Violation of Human Rights and Fundamental Freedoms, in Any Part of the World, with Particular Reference to Colonial and Other Dependent Countries and Territories: Extrajudicial, Summary or Arbitrary Executions*. Report by the Special Rapporteur, Mr. Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights Resolution 1993/71, UN Doc. E/CN.4/1994/7, 7 December 1993, §§ 688 and 711. See also in this sense IACtHR, *Garrido and Baigorria v. Argentina*, Judgment (Reparations and Costs), 27 August 1998, § 72.

⁵⁰ International Law Commission (‘ILC’), Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries (‘ILC Draft Articles’), UN Doc. A/RES/56/83, 22 January 2002, Art. 34.

3.2 Criminal Justice and the Traditional Conception of Reparation

Conceiving criminal prosecution as an integral component of victims' right to remedy may potentially be at odds with the way in which the concept of reparation has been traditionally used in international law where it is considered to be non-punitive in character.⁵¹ As a matter of fact, prosecution cannot properly 'wipe out' the consequences of an illegal act; bringing to justice those responsible for the unlawful killing of an individual does not seem, at least at a first sight, to repair the injury caused by the wrongful act. Accordingly, some authors have objected to the notion of punitive damages. For instance, Jiménez de Aréchaga defined them 'incompatible with the basic idea of reparation'.⁵²

This position, however, has been progressively abandoned by legal scholars, as well as by the practice of international bodies. This is mainly because the view has emerged, as shown in Chapter I, that certain wrongful acts cannot be adequately repaired by way of restitution or (only) compensation; rather, they also call for satisfaction. In this respect, García-Amador observed that the different forms of reparation pursue two different aims: restitution and compensation seek to properly repair the injury suffered, whilst satisfaction pursues punitive aims since its scope is determined primarily by the character of the wrongful act rather than by the harm caused.⁵³

In this manner, one may observe that international remedies do not only seek to repair the injury suffered as a consequence of the wrongful conduct but also to protect the public interest or legal order by punishing wrongdoers. As the next sub-section will explore, the affirmation of the criminal accountability of wrongdoers as a remedy for international wrongful acts has also been facilitated by the change of paradigm which has occurred throughout the last decades whereby the issue of responsibility for international wrongful acts is not any longer considered only an inter-state issue, but also concerns the interactions between states and individuals as a result of human rights law (amongst other factors).

In international judicial practice states have often requested prosecution of wrongdoers as a measure of reparation, particularly in the traditional framework of the law of state responsibility for injury to aliens which is widely recognised as 'a precursor to international

⁵¹ C. J. Tams, 'Do Serious Breaches Give Rise to Any Specific Obligations of the Responsible State?', 13 *European Journal of International Law* (2002) 1161-1180, at 1166-1170; but see *contra* F.V. García-Amador, *The Changing Law of International Claims*, vol. 2 (Dobbs Ferry: Oceana Publications, 1984), at 575.

⁵² E. Jiménez de Aréchaga, 'International Responsibility', in M. Sørensen (ed.), *Manual of Public International Law* (London: Macmillan, 1968) 531-603, at 571.

⁵³ F.V. García-Amador, *The Changing Law of International Claims*, *supra* note no. 51, at 559.

human rights law'.⁵⁴ Interestingly, judicial bodies linked the state's failure to prosecute to the so-called 'denial of justice', a concept comparable to the right to an effective remedy as emerged in modern human rights.⁵⁵

This link is well exemplified in the famous dictum by Max Huber in the *Spanish Moroccan* case in which he stated that the responsibility of the state can be engaged for denial of justice when it lacked due diligence in the pursuit of criminals.⁵⁶ Similarly, in the *Janes* case, the United States presented a claim on behalf of the relatives of Mr Janes, an American citizen, on the basis of the failure of Mexico to apprehend his murderer. The Claims Commission based its award of compensation on the damage caused to the relatives for the 'indignity' caused by the non-punishment of the wrongdoer.⁵⁷

In the inter-State context, the existence of a link between the prosecution of wrongdoers and the obligation to provide reparation was apparent from the early stages of development of the law of state responsibility. The punishment of individual perpetrators was recognised as an element of satisfaction in the work of the Preparatory Committee of the League of Nations Codification Conference in 1930. The Basis of Discussion Draft 29 established that:

Responsibility involves for the State concerned an obligation to make good the damage suffered ... It may also, according to the circumstances, and when this consequence follows from the general principles of international law, involve the obligation to afford satisfaction to the State which has been injured ... in the shape of an apology (given with the appropriate solemnity) and (in proper cases) *the punishment of the guilty persons*.⁵⁸

Similarly, in an early stage of the drafting of the ILC Draft Articles on State Responsibility for International Wrongful Acts, the prosecution of those responsible for the international violation was explicitly listed among the non-monetary measures of satisfaction, together with official apologies and the formal acknowledgment of the unlawful character of

⁵⁴ D. Shelton, *Remedies in International Human Rights Law* (Oxford: Oxford University Press, 2005), at 59.

⁵⁵ For an historical reconstruction of the intersection between these two branches of international law, see F. Francioni, 'Access to Justice, Denial of Justice and International Investment Law', 20 *European Journal of International Law* (2009) 729-748.

⁵⁶ *Affaires des biens britanniques au Maroc Espagnol (Espagne c. Royaume-Uni)*, 1 March 1925, *Recueil de sentences arbitrales*, vol. II, 615-742, at 645.

⁵⁷ *Laura M.B. Janes et al. (USA) v. the United Mexican States*, 16 November 1925, *Reports of International Arbitral Awards*, vol. IV, 82-98, at 87.

⁵⁸ Conference on the Codification of International Law, 'Basis of Discussion no. 29 (1929)', cited in D. Shelton, *Remedies in International Human Rights Law*, *supra* note no. 54, at 54 (emphasis added). This draft reproduces the text of Art. 10 of a precedent draft prepared by the Institut de droit international, 'Draft on "International Responsibility of States for Injuries on their Territory to the Person or Property of Foreigners" Prepared by the Institut de droit international (1927)', reprinted in *Yearbook of the International Law Commission* (1957), vol. 2, 227-229.

an act.⁵⁹ In the current version of the Articles punishment of the guilty officials is no longer explicitly mentioned in the provision on satisfaction, Article 37. Nevertheless, the ILC Commentary on Article 37 includes ‘disciplinary or penal action against the individuals whose conduct caused the internationally wrongful act’ within the various modalities of satisfaction.⁶⁰ The ILC Commentary further specifies that ‘[t]he forms of satisfaction listed in the article are no more than examples’, and the appropriate modality of satisfaction will depend on the circumstances of the violation and as such cannot be prescribed *a priori*.⁶¹

Therefore, in certain circumstances, the state responsibility regime admits that the criminal accountability of individual perpetrators may be an element of reparation and, more precisely, of satisfaction. The examples provided in the ILC Commentary where states claimed this kind of satisfaction – the killing in Palestine of Count Bernadotte in 1948 and the killing of two US officers in Tehran – further suggest that this form of reparation applies especially to those violations of international law which seriously violate the fundamental rights of individuals (such as the right to life).

The inclusion of prosecution as a form of satisfaction for international wrongful acts has raised a number of theoretical questions. In particular, it has been argued that criminal prosecution is an element of a primary obligation of the state rather than a form of satisfaction, and as such it would not derive from a secondary obligation arising from the international wrongful act.⁶² This doubt has been clearly expressed by Crawford in his Third Report on State Responsibility, where he observed: ‘It may not always be clear whether prosecution of criminal conduct was sought by way of satisfaction or as an aspect of performance of some primary obligation’.⁶³ No trace of this objection can, however, be found in the Commentary to Article 37, where punishment is listed among the examples of satisfaction. Domestic and international practice on the denial of justice mentioned above also confirms that criminal prosecution has been considered in certain circumstances as a secondary obligation owed to wronged states. Moreover, as will be observed below with regard to the practice of human rights supervisory bodies, the fact that the duty to prosecute is conceived as a primary obligation of states does not preclude it from also being considered a measure of reparation for victims.

⁵⁹ See Art. 45, *Draft Articles on State Responsibility with Commentaries Thereto Adopted by the International Law Commission on First Reading*, January 1997.

⁶⁰ Art. 37, ILC Draft Articles.

⁶¹ Commentary to Art. 34 of the ILC Draft Articles, annexed to the ILC Draft Articles, at 106.

⁶² See e.g., G. Bartolini, *Riparazione per violazione dei diritti umani e ordinamento internazionale* (Napoli: Jovene Editore, 2009), at 452-456; A. Seibert-Fohr, *Prosecuting Serious Human Rights Violations*, *supra* note no. 24, at 235-238.

⁶³ J. Crawford, *Third Report on State Responsibility*, UN Doc. A/CN-4/507/Add.4, 15 March 2000, § 192.

It is clear that the traditional framework of state responsibility limited the right to reparation, including the right to have wrongdoers prosecuted, to states. However, as observed in the previous Chapter, the ILC Articles leave the door open to an individual right to reparation, at least in those treaty systems where mechanisms for claiming reparation are provided for, referring for instance to the regime of human rights protection. Accordingly, in those contexts, Article 37 may be read as providing a legal basis for an individual right to prosecution and punishment of human rights offenders.

Taken together, the ILC Articles, as well as the practice on state responsibility for injury to aliens, indicate that reparation for international wrongful acts, particularly in the cases of serious violations, may include the punishment of those individuals responsible for the international wrongful act. Arguably, this is an instructive precedent on the theory and practice of individual remedies for gross violations of human rights.

3.3 International Legal Instruments Establishing a Victims' Right to (Criminal) Justice as an Element of Redress

As noted in Chapter I, human rights instruments are often silent on the modalities of remedies that shall be awarded to victims of human rights violations, leaving in principle the decision as to how to fulfil their obligation to states. Accordingly, there is no international treaty explicitly demanding the right to justice as a form of reparation for victims of human rights violations. In spite of this, in the past two decades, a number of documents adopted within the United Nations have affirmed the idea that the accountability of perpetrators is one of the most important forms of redress for victims of gross violations of human rights. Although these documents have no binding value upon states, they have had a significant influence on the work of human rights supervisory bodies, as will be discussed below, and have provided an important contribution to the progressive development of international standards in this respect.

In a 1993 report to the UN Commission on Human Rights, the Special Rapporteur on extrajudicial, summary or arbitrary executions emphasised the duty to provide compensation to victims of violations of the right to life and linked it to other international legal duties. These other duties included the duty of governments to carry out exhaustive or impartial investigations into allegations of violations of the right to life, to identify, bring to justice and

punish their perpetrators.⁶⁴ In 1998, the Working Group on Involuntary or Enforced Disappearances issued a General Comment to Article 19 of the Declaration on the Protection of All Persons from Enforced Disappearance,⁶⁵ which provides for the right to redress and adequate compensation for victims of acts of enforced disappearance and their family.⁶⁶ In the General Comment, the Working Group noted that the primary duty imposed by the Declaration to establish the fate and whereabouts of the disappeared victim is in itself an important remedy.⁶⁷ Moreover, the Group added that the right to redress referred in Article 19 extends beyond judicial remedies and depends on the nature of the right violated. Specifically, the Committee affirmed that:

Bearing in mind that impunity is one of the major root causes of the widespread practice of enforced disappearance, many victims of such acts and their families consider the prosecution and punishment of the perpetrators as important redress for their suffering.⁶⁸

The General Assembly has similarly emphasised the importance of criminal prosecution as remedy in its resolution on Khmer Rouge Trials of 2003, where it found that ‘the accountability of individual perpetrators of grave human rights violations is one of the central elements of any effective remedy for victims of human rights violations’.⁶⁹ In the ‘‘Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’’,⁷⁰ adopted by the General Assembly in 2005, the criminal accountability of human rights offenders is listed among the measures of satisfaction owed to victims.⁷¹

More recently, efforts have been made to conceptualise victims’ right to justice as an independent right. Mention should be made the ‘Report on the Impunity of Perpetrators of

⁶⁴ *Extrajudicial, Summary or Arbitrary Executions. Report by the Special Rapporteur, Mr. Bacre Waly Ndiaye*, *supra* note no. 49, §§ 688-699.

⁶⁵ Art. 19 of the Declaration provides: ‘The victims of acts of enforced disappearance and their family shall obtain redress and shall have the right to adequate compensation, including the means for as complete a rehabilitation as possible. In the event of the death of the victim as a result of an act of enforced disappearance, their dependants shall also be entitled to compensation.’

⁶⁶ Commission on Human Rights, *General Comment on Article 19 of the Declaration on the Protection of All Persons from Enforced Disappearance, Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. E/CN.4/1998/43, 12 January 1998.

⁶⁷ *Ibid.*, § 69

⁶⁸ *Ibid.*, § 71.

⁶⁹ ‘Khmer Rouge Trials’, *supra* note no. 3, at 1.

⁷⁰ UN GA, *Basic Principles and Guidelines on the Right to Restitution, Compensation and Rehabilitation, for Victims of Gross Violations of Human Rights and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, 16 December 2005.

⁷¹ Art. 22(f) provides: ‘Satisfaction should include, where applicable, any or all of the following: ... (f) Judicial and administrative sanctions against persons liable for the violations.’

Human Rights Violations’⁷² prepared by Louis Joinet the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. In his Report, Joinet held that the right to an effective remedy ‘implies that all victims shall have the opportunity to assert their rights and receive a fair and effective remedy, ensuring that their oppressors stand trial and that they obtain reparation.’⁷³ The Special Rapporteur then introduced the concept of victims’ right to justice, which ‘entails obligations for the State: to investigate violations, to prosecute their perpetrators and, if their guilt is established, to punish them.’⁷⁴ The Joint Report was upheld in substance in the independent study by Diane Orentlicher on best practices, including recommendations, to assist states in strengthening their domestic capacity to combat all aspects of impunity.⁷⁵ This study included the ‘Updated set of principles for the protection and promotion of human rights through action to combat impunity’, which were endorsed by the former Commission of Human Rights in 2005.⁷⁶ Principle 19 of the Set, in particular, recognises victims’ right to justice as the rationale for states’ duty to:

[U]ndertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished.

For the time being, elements in support of a right to justice as an independent right remain limited to few sources of non-binding nature. However, as shall be demonstrated in the next section, the practice of human rights supervisory bodies is increasingly affirming the idea that those responsible for gross human rights violations, including extra-judicial killings, enforced disappearances, torture and ill-treatment should be brought to justice in order to make the remedy granted to victims effective.

⁷² *Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)*, Revised Final Report Prepared by Mr. Joinet Pursuant to Sub-Commission Decision 1996/119, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997.

⁷³ *Ibid.*, § 26.

⁷⁴ *Ibid.*, § 27.

⁷⁵ Commission on Human Rights, *Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening their Domestic Capacity to Combat All Aspects of Impunity*, by Professor Diane Orentlicher, UN Doc. E/CN.4/2004/88, 27 February 2004, §§ 33-42.

⁷⁶ Commission on Human Rights, *Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, Diane Orentlicher; *Addendum: Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005.

3.4 The Practice of Human Rights Supervisory Bodies

As observed in Chapter I, since there are not many instruments dealing specifically with the right to reparation for victims of gross human rights violations (and since those existing have no binding value upon states) the practice of human rights supervisory bodies has been decisive as to the affirmation of a distinct redress regime for this category of victims. This regime is based primarily on the concept that immaterial harm suffered by victims of gross violations of human rights has to be repaired by way of symbolic measures. Among these measures, as this section will discuss, these bodies have progressively included the criminal accountability of those responsible for the violations.

The framing of criminal justice as a victims' right has thus emerged primarily from the interpretation of human rights supervisory bodies of provisions that establish the right to an effective remedy. As observed by Aldana-Pindell, this is unsurprising, as often victims file complaints before those bodies only when the state has refused to prosecute or anyhow denied justice to them.⁷⁷ These complaints have hence revealed the anguish suffered by the victims resulting from the lack of accountability of wrongdoers. Accordingly, they have influenced the decisions by human rights bodies that have gradually considered criminal measures not only for their deterrent aspect, but also as a remedy.

3.4.1 *The Practice of United Nations Treaty Bodies*

In the course of the last two decades the practice of the Human Rights Committee on individual communications has clarified considerably the status and components of the victims' rights to seek and obtain redress under Article 2(3) of the International Covenant on Civil and Political Rights. In particular, the Committee's practice on individual complaints for serious human rights violations has contributed significantly to the progressive expansion of the victims' right to redress.

As observed above, the traditional approach of the Committee has been that of considering punishment as a measure to protect and implement human rights.⁷⁸ Most prominently, the Committee held that impunity weakens respect for human rights and

⁷⁷ R. Aldana-Pindell, 'In Vindication of Justiciable Victims' Right to Truth and Justice for State-sponsored Crimes', 35 *Vanderbilt Journal of International Law* (2002) 1399-1502, at 1414.

⁷⁸ This duty is set out at Article 2(1) and (2) of the ICCPR.

encourages further violations of Covenant rights.⁷⁹ From this perspective, criminal prosecution was required mainly in view of its deterrent effect, as well as a precondition for the enjoyment of human rights.

Gradually, however, the view that the failure to take criminal measures may amount to a violation of an individual right has emerged. Indeed, in a second phase, the Committee developed the view according to which there is a strong ‘interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3.’⁸⁰ However, criminal punishment was not yet required as a matter of an individual right; rather, criminal investigation was considered as a right only where, in its absence, there would have been no hope of initiating successful civil proceedings.⁸¹ For instance, in the case *Rodríguez v. Uruguay*, the Committee held that the victim had the right, under Article 2(3)(a) to an effective remedy and accordingly urged the state to carry out official investigation into the claimant’s allegations, in order to identify those responsible for the violations and enable the claimant to seek civil redress.⁸² Under this approach, the Committee considered that the absence of an investigation constituted ‘a considerable impediment to the pursuit of civil remedies, e.g. for compensation’.⁸³

It has been observed that, considering the drafting history of Art. 2(3) of the ICCPR, it is doubtful whether this provision guarantees criminal prosecution as a remedy.⁸⁴ The *travaux préparatoires* of the Covenant indicates that the proposal to include criminal prosecution among the remedies which victims are entitled to was eventually rejected.⁸⁵ Nonetheless, whereas in its early pronouncements the Committee considered prosecution primarily as a measure of general human rights protection, and held in a number of views on individual communications that ‘the Covenant does not provide for the right to see another person prosecuted’,⁸⁶ a new trend is emerging in the Committee’s interpretation of Art. 2(3). Indeed,

⁷⁹ See e.g. HRC, ‘Concluding Observations of the Human Rights Committee: Sri Lanka’, UN Doc. CCPR/C/79/Add.56, 27 July 1995, § 15; in its General Comment on Art. 2 of the ICCPR, the Committee acknowledged that impunity ‘may well be an important contributing element in the recurrence’ of human rights violations. *General Comment no. 31*, *supra* note no. 36, § 18.

⁸⁰ *Ibid.*, § 8.

⁸¹ See *supra* Section 3.1.1.

⁸² *Rodríguez v. Uruguay*, *supra* note no. 17, § 14.

⁸³ *Ibid.*, § 6.4.

⁸⁴ A. Seibert-Fohr, *Prosecuting Serious Human Rights Violations*, *supra* note no. 24, at 20.

⁸⁵ UN ESCOR Commission on Human Rights, Compilation of the Comments of Governments on the Draft International Covenant on Human Rights and on the Proposed Additional Articles, UN Docs. E/CN.4/365 (Philippines) and A/C.3/L.1166 (Japan), cited in A. Seibert-Fohr, *Prosecuting Serious Human Rights Violations*, *supra* note no. 24, at 20.

⁸⁶ HRC, *H.C.M.A. v. The Netherlands*, *supra* note no. 45, § 11.6; *Rodríguez v. Uruguay*, *supra* note no. 17, § 6.4; *S.E. v. Argentina*, *supra* note no. 45, § 5.5.

recent pronouncements suggest that the right to an effective remedy requires states to carry out prosecutions to bring to justice those responsible.

This view is confirmed by General Comment 31, which considers punishment both as a measure of prevention and as a form of reparation.⁸⁷ The main argument supporting this view in the HRC practice is that non-criminal remedies are inadequate to repair the harm suffered by victims of serious violations of human rights. In the landmark case *Bautista v. Colombia* the Committee rejected Colombia's view that compensation awarded by the Administrative Tribunal constituted an effective remedy for the family of the victim and observed that:

[P]urely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of article 2, paragraph 3, of the Covenant, in the event of particularly serious violations of human rights, notably in the event of an alleged violation of the right to life.⁸⁸

The Committee also restated the duty of Colombia to 'investigate thoroughly alleged violations of human rights, and in particular forced disappearances of persons and violations of the right to life, and to prosecute criminally, try and punish those held responsible for such responsible.'⁸⁹ Similarly, in *Coronel v. Colombia* the Committee found that in cases of serious violations 'as in the case with violations of basic human rights' remedies of a 'purely disciplinary and administrative nature could not be considered sufficient or effective'.⁹⁰ Generally speaking, the UN Committee has found that effective prosecution is required as a remedy in a number of cases involving serious violations of human rights. In particular, a review of the case law of the HRC involving violations of Articles 6 and 8 of the ICCPR indicates that for victims of violations of the right to life and personal integrity respectively (such as in cases involving arbitrary detentions,⁹¹ enforced disappearances,⁹² torture and

⁸⁷ General Comment No. 31, *supra* note no. 36, at §§ 8, 18. In addition the Committee observes at § 16: '[W]here appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.' (emphasis added).

⁸⁸ *Bautista de Arellana v. Colombia* (Comm. No. 563/1993), UN Doc. CCPR/C/55/D/563/1993, 27 October 1995, § 8.2.

⁸⁹ *Ibid.*, at § 8.6.

⁹⁰ *José Antonio Coronel et al. v Colombia* (Comm. No. 778/1997), UN Doc. CCPR/C/76/D/778/1997, 24 October 2002, § 6(2).

⁹¹ *Chiti v. Zambia* (Comm. No. 1303/2004), UN Doc. CCPR/C/105/D/1303/2004, 26 July 2012, § 14.

⁹² See, amongst others, the cases *Bautista v. Colombia*, *supra* note no. 88, §§ 8.2 and 10; *Laureano v. Peru* (Comm. No. 540/1993), UN Doc. CCPR/C/56/D/540/1993, 25 March 1996, § 10; *Jegatheeswara Sarma v. Sri Lanka* (Comm. No. 950/2000), UN Doc. CCPR/C/78/D/950/2000 (2003), 16 July 2003, § 11.

extrajudicial executions),⁹³ prosecution of the offenders is an obligation necessary to ensure the remedy is effective.

A similar interpretation of victims' right to remedy has also been advanced by other UN treaty bodies. As with the HRC, the Committee against Torture has also considered criminal prosecution not only as a general obligation of states but also as an integral element of the right to remedy for victims of torture or ill treatment. Notably, Article 14 the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT'), which establishes a right to remedy for victims of torture, does not explicitly provide for a right of victims to criminal prosecution of the offender. However, the fact that Article 14 calls for *redress*,⁹⁴ in addition to compensation, has been understood as showing that victims are entitled to more than mere economic compensation of the harm suffered and that their rights also includes criminal sanctions against the offenders.⁹⁵

The Torture Committee has confirmed this position in its quasi-judicial practice. In *Kepa Urrea Guridi v. Spain*, for instance, it held that victims of torture are entitled to restitution, compensation and rehabilitation. In this case, the payment of compensation was considered insufficient and, most importantly, the granting of a pardon to the perpetrators of torture was deemed in violation of Article 14(1).⁹⁶ In a similar vein, the Committee criticised the Argentine *Punto Final* legislation which dictated the end of investigation and prosecution against people accused of political violence during the dictatorship, finding that such legislation violated the right to remedy of victims.⁹⁷

The same connection between criminal measures and victims' right to remedy has been elaborated in the context of the International Convention on the Elimination of All Forms of Racial Discrimination ('CERD'). Article 6 of the Convention requires that states parties assure effective remedies against acts of racial discrimination and that victims have the right to seek just and adequate reparation or satisfaction for the damage suffered. In the case of *L.K. v. The Netherlands*, the Committee on the Elimination of Racial Discrimination

⁹³ HRC, *José Vicente and Amado Villafañe Chaparro et al. v. Colombia* (Comm. No. 612/1995), UN Doc. CCPR/C/60/D/612/1995, 29 July 1997, §§ 5.2 and 10; *Chongwe v. Zambia* (Comm. No. 821/1998), UN Doc. CCPR/C/70/D/821/1998, 25 October 2000, § 7.

⁹⁴ In particular, pursuant to Art. 14(1) CAT, '[e]ach State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.'

⁹⁵ N. Roth-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law', 78 *California Law Review* (1990) 449-513, at 466.

⁹⁶ CAT Committee, *Kepa Urrea Guridi v. Spain* (Comm. No. 212/2002), UN Doc. CAT/C/34/D/212/2002, 17 May 2005, § 6.8.

⁹⁷ CAT Committee, *O.R., M.M. and M.S. v. Argentina* (Comm. Nos. 1, 2, & 3/1988), UN Doc. CAT/C/WG/3/DR/1, 2 and 3/1988, 23 November 1989, § 9.

condemned the state authorities for rushing to the conclusion that no racial discrimination was at issue and stated that the authorities had not properly investigated or gathered the necessary testimony.⁹⁸ The Committee elaborated that the right to effective protection and remedies pursuant to Article 6 requires that the states parties promptly investigate with due diligence threats of racial violence.⁹⁹ Since the state authorities had failed to investigate properly the Committee held that ‘in view of the inadequate response to the incidents, the police and judicial proceedings in this case did not afford the applicant effective protection and remedies.’¹⁰⁰

In relation to this case, it has been objected that resort to criminal sanctions as a remedy ‘should not be overemphasized’.¹⁰¹ In particular, it has been remarked that the main point of criticism of the Committee was not the lack of criminal punishment but rather the failure to conduct an investigation in order to establish whether the complainant had been the victim of racial discrimination. Nonetheless, it is telling that the Committee itself, in its General Recommendation on Article 6, explained that ‘the right to seek just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination, which is embodied in Art. 6 of the Convention, is not necessarily secured *solely* by the punishment of the perpetrator of the discrimination’. Arguably, this suggests that criminal measures are considered an element of victims’ right to remedy, although they may need to be accompanied by complementary (not *alternative*) reparation measures.¹⁰²

This hypothesis seems to be confirmed by recent communications brought before the Committee, where there is a clear indication that investigation must be part of criminal proceedings in order to provide victims with an adequate remedy. Specifically, this issue has become relevant in the admissibility stage, where complainants are required to demonstrate that they have exhausted local remedies before bringing their cases before the Committee. In *Habassi v. Denmark*, for example, the respondent state asked the Committee to declare the complaint inadmissible because the complainant still had the opportunity to seek damages in civil litigation. Ultimately, the Committee held that civil remedies were not adequate avenues

⁹⁸ CERD Committee, *L.K. v. The Netherlands* (Comm. No. 4/1991), UN Doc. CERD/C/42/D/4/1991, 16 March 1993, § 6.2.

⁹⁹ *Ibid.*, §. 6.6.

¹⁰⁰ *Ibid.*, § 6.7.

¹⁰¹ A. Seibert-Fohr, *Prosecuting Serious Human Rights Violations*, *supra* note no. 24, at 174.

¹⁰² CERD, *General Recommendation no. 26, The Right to Seek Just and Adequate Reparation or Satisfaction*, UN Doc. A/55/18, annex V at 153 (2000), 24 March 2000, § 2; see also Comm. No. 17/1999, *B.J. v. Denmark*, 17 May 2000, §§ 6.2-6.3.

of redress.¹⁰³ Indeed, the objective of the victim in seeking a criminal conviction of the offender could not be achieved by instituting a civil action which would only lead to compensation for damages. Accordingly, the Committee concluded that the recurrent had exhausted local remedies.¹⁰⁴

3.4.2 *The Practice of the European Court of Human Rights*

The European Court of Human Rights has long denied the existence of an individual right to criminal prosecution of human rights offenders. In the case *Perez v. France*, for instance, it noted that ‘the Convention does not confer any right... to “private revenge”’¹⁰⁵ and that, accordingly, victims did not have the right to have offenders prosecuted under the Convention. Despite the fact that the Court has not recognised an individual right to prosecution, during the last decade it has repeatedly affirmed that victims have a right to an investigation. This claim has been justified by the right of victims to an effective remedy, pursuant to Article 13 of the Convention.

As noted in Chapter I, the Court has often limited the discretion that states have in regard to the choice of the remedy in relation to the nature and the gravity of the violation in question. With regard to gross violations of human rights, including violations of the right to life, freedom from torture or unlawful deprivation of liberty, the Court has found that the right to remedy not only requires compensation for the harm suffered but also an investigation ‘capable of leading to the identification and punishment of those responsible’ for the violation.¹⁰⁶

In the *Kaya* case, for example, the applicant claimed that his brother had been killed by the Turkish security forces. The Court found that the absence of an effective and independent investigation into the death violated not only Article 2 (right to life), but also Article 13:

In particular, where those relatives have an arguable claim that the victim has been unlawfully killed by agents of the State, the notion of an effective remedy for the purposes of Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the

¹⁰³ CERD Committee, *Ziad Ben Ahmed Habassi v. Denmark* (Comm. No. 10/1997), UN Doc. CERD/C/54/D/10/1997, 6 April 1999, § 6.1.

¹⁰⁴ *Ibid.*

¹⁰⁵ ECtHR, *Perez v. France* (App. No. 47287/99), Judgment (Merits), 12 February 2004, at § 70.

¹⁰⁶ ECtHR, *Kaya v. Turkey* (App. No. 22729/93), Judgment (Merits and Just Satisfaction), 19 February 1998, § 107; *Bitiyeva and x. v. Russia* (App. Nos 57953/00 and 37392/03), Judgment (Merits and Just Satisfaction), 21 June 2007, § 156 with further references included therein.

identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure. Seen in these terms the requirements of Article 13 are broader than a Contracting State's procedural obligation under Article 2 to conduct an effective investigation.¹⁰⁷

Recent developments in the Court's jurisprudence on criminal matters signal a notable development in accordance with the parallel developments within universal and regional bodies. Indeed, the case law of the Court has progressively affirmed that, in certain circumstances, the criminal prosecution of human rights offenders is necessary to make the remedy granted to victims effective. It can be argued that this entails that criminal punishment is considered an integral element of victims' right to remedy.

For instance, in *Nikolova and Velichkova v. Bulgaria* the respondent state contested the competence of the victim to challenge the inadequacy of criminal proceedings against his perpetrator, on the basis that the applicants had already received compensation for breach of their rights.¹⁰⁸ According to the Court, however, 'in cases of wilful ill-treatment resulting in death the breach of Art. 2 cannot be remedied exclusively through an award of compensation.'¹⁰⁹ The inadequacy of the proceedings against the police officers and the suspension of the sentences were considered to be in violation of the procedural obligations of the right to life. This has led the Court to conclude that the victim of the crime had not been provided with appropriate 'redress'.¹¹⁰

This pronouncement represents a major change in the case law of the European Court. Whereas traditionally only investigation was considered in terms of remedial measures for the victim, the Court now holds that the failure to resort to criminal measures, or their inadequacy, violates *per se* the rights of the individual victim. Therefore, while accountability had been considered a matter of human rights protection, the current approach is to also seek criminal proceedings in the interests of the victims. As a matter of fact, this approach does not entail a complete shift of the rationale of criminal punishment. The Court still maintains that criminal proceedings are necessary to deter future violations and to preserve public

¹⁰⁷ ECtHR, *Kaya v. Turkey*, *supra* note no. 106, § 107; see also *Keenan v. the United Kingdom* (App. No. 27229/95), Judgment (Merits and Just Satisfaction), 3 April 2001, § 122; *Assenov and Others v. Bulgaria* (App. No. 90/1997/874/1086), Judgment (Merits and Just Satisfaction), 28 October 1998, § 117; *Kurt v. Turkey* (App. No. 23164/09), Judgment (Merits and Just Satisfaction), 25 May 1998, § 40.

¹⁰⁸ ECtHR, *Nikolova and Velichkova v. Bulgaria* (App. No. 7888/03), Judgment (Merits and Just Satisfaction), 20 December 2007, § 45; see in the same sense, *Dink v. Turkey* (App. Nos. 2668/07, 6102/08, 30079/08, 7072/09 et 7124/09), Judgment (Merits and Just Satisfaction), 14 September 2010, §§ 141-145; *El Masri v. The Former Yugoslav Republic of Macedonia* (App. No. 39630/09), Judgment (Merits and Just Satisfaction), 13 December 2012, §§ 251-262.

¹⁰⁹ ECtHR, *Nikolova and Velichkova v. Bulgaria*, *supra* note no. 108, § 55.

¹¹⁰ *Ibid.*, § 64.

confidence in the rule of law.¹¹¹ However, it also reads concepts of criminal punishment into the victim's rights and considers criminal sanctions to be a necessary measure of redress.

As mentioned above, criminal prosecution is not imposed as a remedy in any circumstances in which a violation of a conventional right has taken place. Rather, the character of the violation and the identity of the author are relevant in this regard. The Court has ruled on this issue in the case *Calvelli and Ciglio* relating to the absence of criminal proceedings in cases of death resulting from medical negligence. In this case, the Court did not consider it necessary to verify the compatibility of the absence of criminal proceedings (due to the application of statutes of limitations) with conventional obligations, as the applicants could still access a form of compensation for damage suffered in a civil proceeding.¹¹² In other words, in the opinion of the Court, the Italian legislation offered an alternative remedy to the victims to the criminal conviction, no longer available due to the expiry of limitation periods, which could be sufficient to remedy the damage. Of course, it is important to take into account the limited scope of the decision in the case *Calvelli and Ciglio*. As the Court specified:

[I]f the infringement of the right to life or to personal integrity is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case. *In the specific sphere of medical negligence* the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts [...].¹¹³

The same approach has been adopted by the Court with respect to violations of Article 2 deriving from negligent acts by state authorities. For example, in the *Öneryildiz* case, relating to a methane-gas explosion in a municipal landfill site which caused the death of thirteen people, the Court established that:

The administrative courts dealing with his case were indisputably empowered to assess the facts established thus far, to apportion liability for the events in issue and to deliver an enforceable decision. The administrative-law remedy used by the applicant was, on the face of it, sufficient for him to enforce the substance of his complaint regarding the death of his relatives and was capable of affording him adequate redress for the violation of Article 2 found above.¹¹⁴

¹¹¹ *Ibid.*, § 57.

¹¹² ECtHR, *Calvelli and Ciglio v. Italy*, *supra* note no. 39, § 54. See also Dissenting Opinions of Judges Lorenzen and Vajić in *Anagnostopoulos v. Greece* (App. No. 54589/00), Judgment (Merits and Just Satisfaction), 3 April 2003; *Kostantinos Stokas v. Greece* (App. No. 51308/99), Decision (Admissibility), 29 November 2001.

¹¹³ ECtHR, *Calvelli and Ciglio*, *supra* note no. 39, § 51.

¹¹⁴ ECtHR, *Öneryildiz v. Turkey*, *supra* note no. 22, § 151.

Although in these cases the Court did not find that the failure to resort to criminal sanctions violated individual rights, it is nonetheless remarkable that it held that it must ‘examine, from the standpoint of the effectiveness of existing remedies, the protection which the applicant was afforded in seeking to establish the liability of the accused.’¹¹⁵ The Court also questioned whether only a ‘criminal remedy’ would have been capable of satisfying the requirements imposed by the primary right violated.¹¹⁶ In so doing, the judges indicated their willingness to consider criminal accountability as an element of victim’s right to remedy. For the time being, however, as the above analysis has demonstrated, this is true only in cases of gross violations of human rights.

3.4.3 *The Practice of the Inter-American System for the Protection of Human Rights*

The activities of the Inter-American institutions for the promotion and protection of human rights are particularly relevant to the determination of standards for victims’ redress in cases of serious violations of human rights. Indeed, as we saw in Chapter I, the Inter-American human rights system has frequently dealt with human rights violations of a serious character and has often directed states to undertake specific actions to remedy those violations.¹¹⁷ In practice Inter-American institutions have promoted an unprecedented interpretation of victims’ right to remedy, articulating a mandatory interaction between criminal and civil redress. In their practice on serious human rights violations the Inter-American institutions have consistently argued that the right to reparation is linked to the duty of the state to prevent, investigate and punish violations.

Both the Commission and the Court have found that for a state to provide effective recourse for individuals seeking redress for serious human rights violations pursuant to Article 25 of the ACHR it must initiate procedures to identify, prosecute and punish those responsible for the violations. For instance, the Inter-American Commission has held that when the state fails to prosecute serious crimes it violates the right to judicial protection of the victims and their relatives. This reasoning was employed in *Carmelo Soria Espinoza v. Chile*, where the Commission criticised an amnesty law passed in Chile which left the victim and his family ‘without any judicial recourse that might have permitted those responsible for the

¹¹⁵ ECtHR, *VO v. France* (App. No. 53924/00), Judgment (Merits), 8 July 2004, § 87.

¹¹⁶ *Ibid.*, §. 94.

¹¹⁷ For a comprehensive overview, see T. Antkowiak, ‘Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond’, 46 *Columbia Journal of Transnational Law* (2007-2008) 351-419.

human rights violations... to be duly judges and punished.’¹¹⁸ Judicial recourse is not as such limited to civil proceedings for compensation; in cases of serious violations, the Commission also requires that criminal proceedings be initiated with a view to punishing those responsible. In other words, in the view of the Inter-American Commission on Human Rights, the right to judicial protection entails the obligation to prosecute and punish those responsible for serious violations of human rights.¹¹⁹

The same approach has been adopted by the Inter-American Court of Human Rights. According to its interpretation of Article 25, judicial protection requires access to the courts in order that ‘those responsible for human rights violations may be tried and reparations obtained.’¹²⁰ Through a combined reading of Article 8 (right to a fair trial) and Article 25 (right to judicial protection), the Inter-American institutions have now firmly established a victim’s right to justice in cases of serious violations of human rights. As observed by the Court in *Durand and Ugarte*:

Article 8(1) of the American Convention, in connection with article 25(1) thereof, confers to victims’ relatives the right to investigate their disappearance and death by State authorities, to carry out a process against the liable parties of unlawful acts, to impose the corresponding sanctions, and to compensate damages suffered by their relatives.¹²¹

The right to justice for victims of gross human rights violations has been refined as the Court has tackled more cases. First of all, the Court has emphasised the connection between criminal justice and victims. In *Goiburú et al v. Paraguay*, a case concerning the disappearance of four men opposing the ruling regime, the Court observed that ‘[t]he absence of a complete and effective investigation into the facts and the impunity constitute a source of additional suffering and anguish for the next of kin.’¹²² From this perspective, investigations and prosecutions act as reparations because they restore the dignity of the deceased and grant consolation and closure to the survivors of the tragedy.

¹¹⁸ IAComHR, Case 11.725, *Carmelo Soria Espinoza (Chile)*, 19 November 1999, § 90.

¹¹⁹ *Ibid.*, §§ 86-91; Case 11.228, 11.229, 11.231 and 11.182, *Meneses Reyes, Lagos Salinas, Alsina Hurtos and Vegara Inostroza v. Chile*, 15 October 1996, §§ 67-71; Case 10843, *Garay Hermosilla v. Chile*, 15 October 1996, §§ 68-72; Case 10.488, *Ignacio Ellacuría S.J. et al (El Salvador)*, 22 December 1999, §§ 189-196; Case 11.654, *Riofrío Massacre (Colombia)*, 6 April 2001, §§ 64-76; Case 10.480, *Lucio Parada Cea et al. v. El Salvador*, 27 January 1999, §§ 124-129.

¹²⁰ IACtHR, *Castillo Páez v. Peru*, Judgment (Reparations and Costs), 27 November 1998, § 106.

¹²¹ IACtHR, *Durand and Ugarte v. Peru*, Judgment (Merits), 16 August 2000, § 130; see also *Blake v. Guatemala*, Judgment (Merits), 24 January 1998, § 97; *Villagrán Morales et al v. Guatemala*, Judgment (Merits), 19 November 1999, § 225; *Las Palmeras v. Colombia*, Judgment (Merits), 6 December 2001, § 65; *Juan Humberto Sánchez v. Honduras*, Judgment (Preliminary Objections, Merits, Reparations, and Costs), 7 June 2003, §§ 121-136; *Myrna Mack Chang v. Guatemala*, Judgment (Merits, Reparations and Costs), 25 November, 2003, § 200-211.

¹²² IACtHR, *Goiburú et al v. Paraguay*, Judgment (Merits, Reparations and Costs), 22 September 2006, § 158.

Secondly, the Court has set out that the investigation and prosecution process must be timely and effective. In *Plan de Sánchez Massacre v. Guatemala*, concerning the mass murder of more than two hundred persons of a Mayan indigenous community, the Court noted that the substantial period of time (more than twenty-two years) that had passed without any prosecution over the massacre, ‘constitutes a situation of impunity [which] harms the victims, and encourages the chronic repetition of the human rights violations’.¹²³

Thirdly, the Court has specified who must be the subject of investigation and punishment. In *Myrna Mack-Chang v. Guatemala*, an extra-judicial killing case, the Court affirmed that:

To completely redress this aspect of the’ violations committed, the State must effectively investigate the facts in the instant case, so as to identify, try, and punish all the direct perpetrators and accessories, and the other persons responsible for [the victim’s extra-legal execution], and for the cover-up of the extra-legal execution and of the other facts.¹²⁴

All in all, in recent years the Inter-American institutions have progressively emphasised the remedial function of criminal punishment. The Court has even considered the duty to investigate and prosecute for serious human rights violations and the corresponding right to judicial protection as *jus cogens*.¹²⁵ The view of the Commission, as well as that of the Court, is that for a state to provide for appropriate judicial recourse to remedy serious human rights violations, such as torture and homicide, it must open the relevant procedural process and conduct the criminal prosecution to its conclusion. If the accused is found to be responsible, victims’ right to justice demands that he or she be punished according to the criminal sanctions applicable under the domestic law of the state.¹²⁶

The remedial nature of criminal prosecution and punishment is confirmed also by the fact that in recent years the Court has ordered such measures as part of its remedial mandate pursuant to Article 63. Whereas in the early jurisprudence, criminal investigation and punishment were found to fall outside the scope of the Court’s remedial jurisdiction,¹²⁷ in more recent judgments the Court has ruled that states parties as a matter of reparation must

¹²³ IACtHR, *Plan de Sánchez Massacre v. Guatemala*, Judgment (Reparations and Costs), 19 November 2004, § 95.

¹²⁴ IACtHR, *Myrna Mack-Chang v. Guatemala*, *supra* note no. 121, § 275.

¹²⁵ IACtHR, *Goiburú et al. v. Paraguay*, *supra* note no. 122, §§ 84, 131; *La Cantuta v. Peru*, Judgment (Merits, Reparations, and Costs), 29 November 2006, § 160.

¹²⁶ See e.g. IACtHR, *Ignacio Ellacuría*, *supra* note no. 119, § 195; *Lucio Parada Cea*, *supra* note no. 119, § 127; IACtHR, *Las Palmeras v. Colombia*, *supra* note no. 121, § 65; *Durand and Ugarte v. Peru*, *supra* note no. 121, § 130.

¹²⁷ IACtHR, *Velásquez Rodríguez v. Honduras*, *supra* note no. 25, § 33.

conduct ‘a genuine and effective investigation to determine the persons responsible for the human rights violations and to punish the liable parties.’¹²⁸

Of course, the right to criminal investigation and prosecution is not framed as a right to punishment at all costs. The rights of the accused under the American Convention must also be respected. And indeed victims’ right to justice and the rights of the accused can be in conflict. In *La Cantuta* case, the Court recognised the potential conflict and indicated that in such cases the rights of the accused may need to be compromised. In particular, if rules in favour of the accused aim or have the effect of shielding perpetrators from criminal responsibility, the Court held that victims’ right to justice ought to prevail.¹²⁹

3.4.4 *The Practice of the African Commission of Human and People’s Rights*

As noted in Chapter I, the African Commission of Human and People’s Rights has only recently started making specific recommendations on remedies in several cases. On a number of occasions, upon finding violations of human rights, the Commission has recommended that the respondent state investigate the circumstances of the violations with a view to identifying the persons responsible. For instance, in a disappearance case, the African Commission recommended the state ‘arrange for the commencement of an independent enquiry in order to clarify the fate of the persons considered as disappeared, identify and bring to book the authors of the violations perpetrated at the time of the facts arraigned.’¹³⁰ Similarly, in another case concerning violations of the right to life and enforced disappearances, the Commission recommended that the respondent state identify the perpetrators of the human rights violations at stake and to bring them to justice.¹³¹ Interestingly, a similar recommendation has been made in one of the most innovative pronouncements of the Commission, namely the *Ogoniland* case,¹³² concerning violations of economic, social and cultural rights as a result of concessions by Nigeria to foreign oil companies. In that case, the Commission recommended

¹²⁸ IACtHR, *Paniagua Morales et al. v. Guatemala*, Judgment (Merits), 8 March 1998, § 181(6); see also *Villagrán Morales et al. v. Guatemala*, Judgment (Reparations and Costs), 26 May 2001, §§ 100-101; *Bámaca Velázquez v. Guatemala*, Judgment (Reparations and Costs), 22 February 2002, §§ 78 and 106(2); *Myrna Mack-Chang v. Guatemala*, *supra* note no. 121, § 275.

¹²⁹ IACtHR, *La Cantuta v. Peru*, *supra* note no. 125, § 49.

¹³⁰ AfrComHPR, *Malawi African Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l’Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l’Homme v. Mauritania* (Comm. Nos. 54/91-61/91-96/93-98/93-164/97-196/97-210/98), 11 May 2000, recommendations, lit. 1.

¹³¹ AfrComHPR, *Mouvement Burkinabé des Droits de l’Homme et des Peuples v. Burkina Faso* (Comm. No. 204/97), 7 May 2001, recommendations, lit 1.

¹³² AfrComHPR, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria* (Comm. No. 155/96), 27 October 2001, § 61.

the state ensure the protection of the environment, health and livelihood of the victims by ‘permitting independent investigators free access to the territory; conducting an investigation into the human rights violations.’¹³³

¹³³ *Ibid.*, recommendations lit. 1, 2, 4.

4 CONCLUDING REMARKS

This Chapter has shown that certain human rights violations are deemed so serious that states are under an obligation to criminalise them. The duty to take adequate measures in response to serious violations of human rights has two rationales. On the one hand, prosecution and punishment of serious human rights violations serves the general interest in human rights protection. By prosecuting and punishing past violations, a state shows that human rights have to be respected and thereby reaffirms the rule of law. At the same time, by doing so, the state seeks to prevent future violations; indeed, if human rights breaches are ignored, the validity of human rights itself is put in danger, thus endangering their future protection.

On the other hand, the growing affirmation of the idea that victims have legitimate interests in the prosecution of human rights offenders has undoubtedly influenced the interpretation of international human rights instruments. Human rights supervisory bodies increasingly call for a victims' right to have the violations investigated and the perpetrators prosecuted as redress for the harm suffered on the basis that civil remedies can never adequately address the type of suffering they have been inflicted. This means that criminal measures not only re-establish the validity of a right in principle but also acknowledge the suffering of victims and condemn the injustice they suffered. Criminal accountability of the offender is thus not only important in the interests of general prevention but also in the interest of the individual victim.

The idea of a victims' right to justice is firmly established in the jurisprudence of the Inter-American institutions which first elaborated this concept. In the view of the Inter-American Commission and Court, victims' redress in cases of serious violations of human not only demands an investigation into the circumstances of the violations but also the effective prosecution and punishment of those responsible for them. A remedial conception of criminal prosecution is also emerging, albeit more slowly, before other judicial and quasi-judicial human rights supervisory bodies, namely the Human Rights Committee, the European Court of Human Rights and the African Commission on Human and Peoples' Rights.

The gradual development of a victims' right to the criminal accountability of those responsible of serious violations of human rights has two important consequences. First, if the idea of a right to justice were pursued, a fundamental change would occur with regard to the scope of the duty to prosecute human rights violations. Second, since prosecution and

punishment are increasingly considered integral components of the individual right to remedy, the role of victims in the criminal process should also be reconsidered.

With regard to the scope of the duty to prosecute it is important to observe that conceiving such a duty in the general pursuit of the overall protection of human rights, as it was traditionally done by human rights bodies, subjects the duty itself to an inherent limitation. This limitation, especially relevant in post-conflict situations, is that the duty to prosecute should not be read as an obstacle to the restoration of peace and social security in the community affected by serious violations of human rights. Accordingly, while the state remains under the obligation to criminalise serious violations of human rights, as well as to establish effective law-enforcement machinery, a deviation from the duty to prosecute may be allowed if this would better serve the general enjoyment of human rights. In this respect, as will be observed in Chapter IV, it is remarkable that human rights bodies have consistently rejected the argument that exempting criminal liability of offenders would contribute to restore the respect for human rights. Consequently, they have progressively rejected amnesty laws and other measures preventing punishment of those responsible of gross violations of human rights.

This approach supports the affirmation of the view that prosecution and punishment of human rights offenders not only serves general human rights protection, but is also integral elements of victims' right to remedy. Indeed, if criminal accountability of human rights offenders is considered a remedial measure for victims, there is no room to argue that it can be compromised in favour of the general protection of human rights. Furthermore, alternative mechanisms of redress (such as truth and reconciliation commissions) and the option of performing a balancing act (accountability v. peace) are necessarily precluded. Arguably, the emergence of remedy as a rationale for prosecution and punishment potentially offers a better contribution to the fight against impunity. As will be discussed in Chapter IV, the traditional obstacles arising out of state sovereignty, such as immunities, are increasingly set aside and justice is in turn allowed to run its course, both to meet the demands of the victims and to reaffirm universal values.

Reading criminal justice into victims' rights also demands a reconsideration of the role and the rights of victims in criminal proceedings. In contrast to the development of human rights norms protecting the rights of the defendant, little attention was traditionally given to the rights of victims in criminal proceedings. This is now changing as a result of the emerging view that justice cannot be achieved if the voices of victims are not heard and their suffering is not addressed. In particular, the gradual affirmation of a right to justice entails the

reconsideration of the role that victims ought to play in the criminal process. If prosecution is demanded as a remedy for victims, then victims should be able to claim such right and to enforce it. Chapters V and VI will discuss to what extent the affirmation of a victims' right to justice has influenced the role and the rights of victims in criminal proceedings before domestic and international criminal courts respectively.

Chapter IV

Obstacles to the Exercise of the Right to Justice

1 INTRODUCTORY REMARKS

Until recently, states' responses to mass atrocities have not always been faithful to the emerging norm demanding prosecution of perpetrators of international crimes and gross human rights violations. One only has to think, for instance, of Southern Europe's transition from dictatorship in the 1970s, Eastern Europe's transition from Communism in the 1980s and 1990s and the bloody democratisation process in Latin America: in all these situations prosecution has been 'the exception rather than the norm'.¹ During such periods it has been said, 'accountability was often unimaginable'.² As Aguilar reported, for instance, members of the Franco's regime in Spain never considered the possibility of being held accountable.³ In some countries, the state's lack of political will to impose accountability for past abuses has led to the adoption of amnesty laws and pardons for those responsible for such abuses. In other cases, prosecution for past abuses has been thwarted or limited by other impediments arising from national and international law.

The biggest hurdle in terms of prosecuting past abuses is the passage of time. In the immediate aftermath of mass atrocities states are often unable to take action against perpetrators of human rights abuses. In most cases criminal trials only start many years after the facts (one may think, for example, of the recent cases brought before Italian military courts against Nazi war criminals).⁴ Nonetheless, prosecution occurring after a certain period of time has passed is subject to two procedural obstacles. The first is the application of statutory limitations. Statutory limitations are rules that bar criminal prosecution after the expiry of a certain time period and are generally designed to provide closure for defendants

¹ C. Nino, *Radical Evil on Trial* (New Haven: Yale University Press, 1996), at 3.

² K. Sikkink, 'The Age of Accountability: The Global Rise of Individual Criminal Accountability', in F. Lessa and L.A. Payne, *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (Cambridge: Cambridge University Press, 2012) 19-41, at 19.

³ P. Aguilar, 'The Spanish Amnesty Law of 1977 in Comparative Perspective: From a Law for Democracy to a Law for Impunity', *Ibid.*, 315-335, at 325.

⁴ On this issue, see M. De Paolis, 'La punizione dei crimini di guerra in Italia', in S. Buzzelli, M. De Paolis, A. Speranzoni, *La ricostruzione giudiziale dei crimini nazifascisti in Italia: questioni preliminari* (Torino: G. Giappichelli Editore, 2012) 63-155.

and witnesses and ensure that evidence is not unreasonably stale.⁵ Plainly, such statutes may constitute a bar to reparation for victims or punishment for perpetrators.

Another obstacle to prosecution for past abuses is the claim of retroactive justice. When trials occur many years after the fact one may object that at the time the events took place, such conduct was not criminal. As such, applying contemporary criminal law to past events would amount to a breach of the basic principle of *nulla poena sine lege* and the prohibition of *ex post facto* laws.⁶ Finally, the prosecution of state-sponsored mass atrocities is subject to an obstacle that lies in the traditional framework of international law, namely the functional and personal immunity of state officials from foreign criminal jurisdictions.

Nonetheless, as discussed in Chapter III, recent years have seen the progressive affirmation of an international norm in favour of a state's duty to prosecute those allegedly responsible for certain serious violations of human rights, particularly those amounting to international crimes. At the same time an increase in prosecutions for these types of violations can be observed in the last two decades, a phenomenon which has been described as 'the justice cascade'⁷ or, as UN Secretary General Ban Ki-moon recently described it, the 'new age of accountability'.⁸

The development of a state's obligation to investigate and prosecute serious human rights violations has been paralleled, as discussed in Chapter III, by the emergence of a corresponding right to justice for victims of such violations, understood as the right to the identification and prosecution of wrongdoers.

In light of these developments, it is important to question whether the validity of the obstacles to prosecution described above has also been progressively reduced, in order to comply with international obligations and to allow victims to effectively exercise their right to justice. To this end, this Chapter will present the main obstacles to national and international prosecutions of international crimes – namely immunities, amnesties, statutory limitations and the principle of legality – and for each of them it will seek to discern: (i) whether rules of

⁵ See J. Anthony Chavez, 'Statutes of Limitations and the Right to a Fair Trial: When Is a Crime Complete?', 10 *Criminal Justice* (1995) 2-6 and 48-51; Y. Listokin, 'Efficient Time Bars: A New Rationale for the Existence of Statutes of Limitations in Criminal Law', 31 *Journal of Legal Studies* (2002) 99-118.

⁶ Prohibition of *ex post facto* laws can be found in a number of international instruments, including Art. 15 of the International Covenant on Civil and Political Rights ('ICCPR'), Art. 7 of the European Convention on Human Rights ('ECHR'). See also Art. 99(1) Geneva Convention Relative to the Treatment of Prisoners of War, Art. 67 Geneva Convention Relative to the Protection of Civilians in Time of War, and Art. 75(4)(c) Additional Protocol I to the Geneva Conventions.

⁷ K. Sikkink, 'The Age of Accountability', *supra* note no. 2, at 19.

⁸ 'Kampala, Uganda, 31 May 2010 - Secretary-General's 'An Age of Accountability' address to the Review Conference on the International Criminal Court', available online at <http://www.un.org/sg/statements/?nid=4585> (last visited on 12 June 2013).

international law exist or are emerging that erode the validity of the obstacle, and (ii) whether this evolution has been influenced by the progressive affirmation of a victim's right to justice in cases of gross violations of human rights.

2 IMMUNITIES OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

The immunity of state officials from foreign criminal jurisdiction is probably one of the most problematic legal obstacles to the effective exercise of victim's right to justice since, by definition, immunity entails the exemption of foreign state officials from the criminal jurisdiction in the forum state. State officials may enjoy two different types of immunity in respect to criminal jurisdiction: functional and personal. Functional immunity is an immunity *ratione materiae* and is generally recognised by legal scholars as covering the official acts of all state officials as determined by the nature of the acts in question rather than by the position of the state agent who performed them.⁹ Accordingly, former state officials can be covered by such immunity even after leaving office. Personal immunity is an immunity *ratione personae* and potentially covers both public and private acts derived from the position of the state agent concerned.¹⁰ Personal immunity is enjoyed by diplomats and, according to the International Court of Justice, heads of state, heads of government and foreign ministers.¹¹ Although broad in scope, this type of immunity is limited temporally: once the state agent leaves the office, he or she is not any longer entitled to such immunity.¹²

Broadly speaking, both types of immunity have their origin in the notion of sovereign equality of states and the idea that state agents should be free to carry out their official functions without the interference of another state. Despite the fact this rationale is deeply entrenched in fundamental notions of international law, over time immunities of state agents have been considerably restricted, especially where these agents have been accused of being responsible for perpetrating international crimes. A distinction, however, has to be drawn between functional immunities and personal immunities.

⁹ For a thorough analysis of the theories and practice on functional immunity, see P. De Sena, *Diritto internazionale e immunità funzionale degli organi statali* (Milano: Giuffrè, 1996). An interesting thesis is the one argued by Micaela Frulli, according to whom an analysis of state practice reveals that there is not a general rule of functional immunity applicable to all state organs. According to Frulli, only high state officials are covered by functional immunity; furthermore, this rule has been interpreted in a restrictive manner, in the sense that it is generally accepted that it does not cover international crimes. M. Frulli, *Immunità e crimini internazionali. L'esercizio della giurisdizione penale e civile nei confronti degli organi di stati sospettati di gravi crimini internazionali* (Torino: Giappichelli, 2007), at 57-60.

¹⁰ A. Cassese, *International Criminal Law* (Oxford, Oxford University Press, 2008), at 309-313; B. Conforti, *Diritto Internazionale*, 8th ed. (Napoli: Editoriale Scientifica, 2010), 244-245. For a thorough analysis of personal immunities in international law, see A. Tanzi, *L'immunità dalla giurisdizione degli agenti diplomatici* (Padova: Cedam, 1992).

¹¹ ICJ, *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), *ICJ Reports* 2002, p. 3, 14 February 2002, §§ 51-57.

¹² See references *supra* note no. 10.

2.1 Functional Immunity and International Crimes

Functional immunity is considered to be ‘one of the oldest rules of international law’¹³ and is generally understood to apply to all state agents acting in their official capacity. Based on this rule, a state agent acting on behalf of a state cannot be prosecuted for any violation of international law perpetrated while performing an official function. As mentioned above, the rationale of this rule lies in the idea that states must not intervene in the internal matters of states and, as a consequence, on the relationship between states and their agents. Accordingly, state agents cannot be prosecuted by foreign states for international wrongful acts committed on behalf of their states; the latter can instead be held responsible for those acts at the international level.¹⁴

The classic rule of functional immunity has been substantially limited since the Second World War, with international treaties and judicial decisions being adopted which deny the applicability of such rules to state officials accused of international crimes. A number of international treaties on the prevention and repression of international crimes adopted in the aftermath of the Second World War, for instance, include a provision expressly providing for the individual criminal responsibility of perpetrators, regardless of their status of state officials. Mention can be made of Article IV of the *Convention on the Prevention and Punishment of the Crime of Genocide* which establishes that ‘[p]ersons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals’. Similar provisions have been included in the *Convention on the Suppression and Punishment of the Crime of Apartheid*¹⁵ and in the *Draft Code of Crimes against the Peace and Security of the Mankind*.¹⁶

Other instruments adopted during this time have expressly established the individual criminal responsibility of perpetrators of international crimes, without specifying that state officials can be held responsible. In this respect, Frulli has rightly observed that no such provision was included as it was taken for granted that state officials could also be prosecuted for the violations at issue given that (i) it was already well-established that state agents could

¹³ A.V. Lowe, *International Law* (Oxford: Oxford University Press, 2007), at 184.

¹⁴ A. Cassese, *International Criminal Law*, *supra* note no. 10, at 302-303.

¹⁵ Art. III of the Convention on the Suppression and Punishment of the Crime of Apartheid establishes that: ‘International criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State, whether residing in the territory of the State in which the acts are perpetrated or in some other State.’

¹⁶ Art. 7 of the *Draft Code of Crimes against the Peace and Security of the Mankind* provides as follows: ‘The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.’

be held accountable for the violation at issue,¹⁷ or (ii) the commission of the crime by a state agent is an essential element of the crime itself.¹⁸

The practice of national courts and prosecuting authorities reveals a generally accepted exception to the functional immunity of officials: that this immunity does not apply to international crimes. A justification often given by domestic courts with regards to the restriction of immunity in this way is that international crimes can never be regarded as official acts and, therefore, are not covered by functional immunity.¹⁹ For instance, the Supreme Court of Israel in the Eichmann case rejected the defendant's argument that he could not be responsible for the crimes he was accused of as these were 'acts of states' – ruling instead that functional immunity does not apply to perpetrators of international crimes:

[E]specially when they are international crimes in the class of "Crimes against Humanity" (in the wide sense). Of such heinous acts it must be said that they are completely outside the 'sovereign' jurisdiction of the state that ordered or ratified their commission, and therefore those who participated in such acts must personally account for them and cannot seek shelter behind the official character of their task or mission, or behind the 'Laws' of the state by virtue of which they purported to act.²⁰

Following the *Pinochet* case, in which the UK House of Lords allowed an extradition application by Spain in respect of the former Chilean president to proceed,²¹ there has been significant activity involving prosecution of foreign state officials for international crimes. Even though most prosecutions have dealt with crimes committed by junior officials,²² it can

¹⁷ This is the case of the Geneva Conventions of 1949, which provide for individual criminal responsibility for war crimes. As pointed out by Frulli, no provision was included in the Conventions specifying that state agents could also be held accountable, as this rule was already well-established in the state practice. (M. Frulli, *Immunità e crimini internazionali*, *supra* note no. 9, at 95-96).

¹⁸ This is the case, for instance, of the Convention against Torture and Other Cruel or Degrading Treatment or Punishment, which includes among the elements of the crime of torture that of being committed 'by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'. (Art. 1(1))

¹⁹ A. Cassese, *International Criminal Law*, *supra* note no. 10, at 305-308. Less convincing appears the thesis upheld by the International Court of Justice according to which international crimes cannot be considered official acts, but only private acts (ICJ, *Case Concerning the Arrest Warrant*, *supra* note no. 11, § 61) As authoritatively held by legal scholars, not only international crimes perpetrated by state officials, particularly high-range agents, are hardly committed without recurring to their public functions; moreover, characterizing international crimes as mere private acts would result in the impossibility of invoking state responsibility for such crimes. M. Frulli, *Immunità e crimini internazionali*, *supra* note no. 9, at 129-132; A. Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case', 13 *European Journal of International Law* (2002) 853-875, at 866-870.

²⁰ Israel, Supreme Court, *Eichmann Case*, Judgment of 29 May 1962, § 14.

²¹ UK, House of Lords, *Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet; R v. Evans and Another and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet*, 24 March 1999. For a thorough review of the case against Augusto Pinochet, see N. Bhuta, 'Justice Without Borders: Prosecuting General Pinochet', 23 *Melbourne University Law Review* (1999) 499-532.

²² See e.g. Belgium (case against former Chadian dictator Hissene Habré and the conviction of Rwandan army major Bernard Ntuyahaga for war crimes and crimes against humanity); France (the two convictions *in absentia* of Mauritanian general Ely Ould Dah and Tunisian official Khaled Ben Said for torture committed in their home

be argued that the fact that such prosecutions have taken place constitutes sufficient evidence that functional immunity should not bar the prosecution of such crimes.

The legal developments that have occurred since the Second World War have led scholars to argue that a customary rule has evolved ‘lifting functional immunities in the case of international crimes’.²³ In particular, Cassese further explained that the rationale of such rule can be identified in the fact that:

In the present international community respect for human rights and the demand that justice be done whenever human rights have been seriously and massively put in jeopardy, override the traditional principle of respect for State sovereignty. The new thrust towards protection of human dignity has shattered the shield that traditionally protected state agents acting in their official capacity.²⁴

The position taken by Cassese represents the two major driving forces behind the development of an international norm lifting functional immunities in cases of international crimes: on the one hand, state sovereignty, and on the other the demands of justice coming from the victims who have increasingly brought claims before criminal courts against state agents allegedly responsible for international crimes.²⁵ From this perspective, although no explicit link is made in the treaties and decisions mentioned above between the rule lifting of immunity and victim’s right to justice,²⁶ we can observe that the need to bring justice to victims has been a decisive factor in the affirmation of such rule.

2.2 Personal Immunities and International Crimes

As mentioned above, personal immunities are granted to some categories of state officials in view of their functions and are aimed at rendering them inviolable while in office and

states); Netherlands (former military leader Désiré Bouterse of Suriname investigated for torture but prosecution time barred; conviction of Congolese official Sebastian Nzapali for torture and conviction of two Afghan intelligence officers for torture); Denmark (prosecution of former chief of staff of the Iraqi Army for war crimes, although he fled the country before trial). Spain issued several arrest warrants in respect of several former heads of state, including two former presidents of Guatemala, Ríos Montt and Oscar Mejía Victores, for genocide, torture and other related crimes. Spanish courts also convicted a former Argentinian naval officer, Adolfo Scilingo, for torture and crimes against humanity committed abroad; a second Argentinian naval officer, Ricardo Cavallo, was also prosecuted, although he was ultimately extradited to Argentina to face trial there.

²³ A. Cassese, *International Criminal Law*, *supra* note no. 10, at 305.

²⁴ *Ibid.*, at 308.

²⁵ M. Frulli, *Immunità e crimini internazionali*, *supra* note no. 9, at 318.

²⁶ In this respect, it is interesting that a link between victim’s rights and immunity has been made by the Institut de droit international, in the *Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in Case of International Crimes*, Napoli session (2009), art. 2(2): ‘Immunities should not constitute an obstacle to the appropriate reparation to which victims of crimes addressed by this Resolution are entitled.’

protecting them from any interference, including in relation to exclusively private acts. The rationale of such a rule is to be found in the need to protect agents dealing with sovereign prerogative of states from abuses and illicit interferences, ultimately jeopardising the conduct of international relations.²⁷

Because of the importance of the objectives underlying this rule there is still much resistance to the development of a norm lifting personal immunities of certain categories of state officials accused of international crimes. As indicated by the International Court of Justice in the *Arrest Warrant* case, personal immunities of senior state officials as heads of state or government, foreign ministers and diplomatic agents must prevent any possible prejudice to the ‘effective performance’ of their functions’.²⁸ In effect, these categories of state agents are immune from jurisdiction in any circumstance, both when engaged in public functions and when they are acting in private capacity. Most importantly, these categories of state agents are entitled to personal immunities even when accused of international crimes.

It has been said above that there are some international treaties that either explicitly or implicitly prescribe that immunities (functional and personal) do not relieve state officials from individual criminal responsibility for the international crimes that form the subject matter of those treaties. Nonetheless, the proposition that senior state officials are entitled to personal immunities even when accused of international crimes is supported by abundant state practice. Reference can be made, for instance, to the two often-cited decisions of Pinochet in the UK²⁹ and Fidel Castro in Spain.³⁰ Furthermore, following the authoritative decision by the ICJ in the *Arrest Warrant* case, which supported the position that serving heads of state, heads of government and foreign ministers enjoy a broad personal immunity from the jurisdiction of foreign domestic courts, including immunity from prosecution for international crimes,³¹ a number of national courts have dismissed cases alleging the commission of international crimes by heads of state and heads of government on the ground that immunity *ratione personae* bars proceedings.³² As Frulli has stated, the ICJ Decision

²⁷ R. Cryer, A. Friman, D. Robinson and E. Wilmshurst, *International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2010), at 533-534.

²⁸ *Case Concerning the Arrest Warrant of 11 April 2000*, *supra* note no. 11, § 53.

²⁹ *Ex parte Pinochet*, *supra* note no. 21, §§ 171-191 (Lord Millet) (‘Senator Pinochet is not a serving head of state. If he were, he could not be extradited. It would be an intolerable affront to the Republic of Chile to arrest him or detain him’).

³⁰ Spain, Audiencia Nacional, *Fidel Castro*, Order of 4 March 1999, No. 1999/2723.

³¹ *Case Concerning the Arrest Warrant of 11 April 2000*, *supra* note no. 11, § 58.

³² See e.g. Belgium, Cour de Cassation, *Re Sharon & Yaron*, 12 February 2003, reprinted in 42 *International Legal Materials* (2003) 596-604; UK, Judgment of Senior District Judge, *Mugabe*, 14 January 2004, reprinted in 53 *International and Comparative Law Quarterly* (2004) 769-774; and Spain, Audiencia Nacional, Juzgado Central de instrucción No 4, *Paul Kagame et al.*, 6 February 2008.

closed the debate too soon, substantially hindering the development of a rule lifting personal immunities, as was the case in relation to functional immunity for state agents accused of international crimes.³³

In any case, as stated previously, personal immunities only apply to incumbent state officials. As soon as the state official leaves office they no longer enjoy personal immunity and may, therefore, be held liable for any international crime they may have perpetrated while in office, pursuant to the customary rule mentioned above lifting functional immunities in case of international crimes. All in all, the current thrust of international law is to ensure as much as possible criminal accountability of those who engage in international crimes. Ultimately, the immunity of foreign state agent no longer constitutes a powerful obstacle to the exercise of victim's right to justice.

Instead, a different approach has been adopted in relation to the application of personal immunities in cases of international crimes when jurisdiction over these crimes is assigned to international criminal tribunals. This aspect will be dealt with in the next subsection.

2.3 Immunities of State Officials and International Prosecution of International Crimes

As discussed above, while it is generally accepted that functional immunity from foreign criminal jurisdiction does not apply to state agents who have allegedly committed international crimes, state practice indicates that high-ranking foreign officials suspected of such crimes may be covered by personal immunities when they are in office. In this respect, the practice of international criminal tribunals is radically different. Although the majority of international and internationalized criminal tribunals do not explicitly rule out the right to invoke personal immunities, the absence of a specific rule has not prevented them from indicting serving heads of state.

Furthermore, statutes of international criminal tribunals have often included a provision expressly providing for the individual criminal responsibility of perpetrators, regardless of their status as state officials. In this respect, reference can be made to Articles 7(2) and 6(2) of the International Criminal Tribunal for the former Yugoslavia ('ICTY') and the International Criminal Tribunal for Rwanda ('ICTR') Statutes respectively, which hold

³³ 'La sentenza ha esercitato una forte influenza sulla prassi successiva e ha chiuso forse troppo bruscamente, e a nostro avviso anticipatamente, il dibattito in materia'. M. Frulli, *Immunità e crimini internazionali*, *supra* note no. 9, at 313.

that '[t]he official position of any accused person, whether as Head of State or Government or as responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment'. These provisions have indeed been interpreted as ruling out the possibility of invoking personal immunities as a bar to prosecution by the tribunals.³⁴ Accordingly, for instance, the ICTY has indicted and prosecuted Slobodan Milošević, when he was serving president of the Federal Republic of Yugoslavia, and Milutinović, when he was President of Serbia.³⁵ Such practice has also been followed by mixed tribunals, such as the Special Court for Sierra Leone, which has indicted the Liberian President, Charles Taylor, when in office.³⁶

Plainly, the rationale for such a progressive approach lies in the fact that international and internationalized criminal tribunals have generally focused on those who bear the greatest criminal responsibility and in most cases that is those with the greatest power such as heads of state or other high-ranking military or governmental officials. This brings the objectives of international criminal justice into conflict with the classic international law on immunities. On the basis of the practice of international criminal tribunals, as well as on the rationale of international criminal justice, Cassese concluded that a customary rule has evolved ruling out personal immunities for senior state officials accused of international crimes when jurisdiction over such crimes is granted to international criminal tribunals.³⁷

At present, the only rule explicitly excluding the right to invoke personal immunities before international criminal tribunals has been set out by the Statute of the International Criminal Court ('ICC'), at Article 27(2), which establishes that 'immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person'. Nonetheless, Frulli has observed, a problem may arise with respect to third states, namely states that have not ratified the Rome Statute and, as such, are not bound by its provisions.³⁸ In particular, in relation to those states, the rule prohibiting personal immunities should be read in conjunction with Article 98(1) of the Statute, which establishes that:

The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of

³⁴ On the ratio of such interpretation, see M. Frulli, *Immunità e crimini internazionali*, *supra* note no. 9, at 112-114 and 248-249.

³⁵ ICTY, Indictment, *Milošević, Milutinović, Sainović, Ojdanić and Stojilković* (IT-99-37), 22 May 1999.

³⁶ SCSL, Prosecution's Second Amended Indictment, *Charles Taylor* (SCSL-03-01-PT), 29 May 2007.

³⁷ A. Cassese, *International Criminal Law*, *supra* note no. 14, at 311-312.

³⁸ M. Frulli, *Immunità e crimini internazionali*, *supra* note no. 9, at 255-256.

a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

Accordingly, it has been argued that even though the ICC can lawfully issue an arrest warrant for a head of state of a third state, states would not be bound to comply with this request.³⁹ A recent example of the problematic relationship between the rule lifting personal immunities and third states is the case of the arrest warrant issued by the ICC against the Sudanese president Bashir. Since Sudan is not a state party of the Rome Statute, the problem arises as to whether states parties are under an obligation to surrender Bashir to the Court, for instance, when the president finds himself on the territory of a contracting state. In this respect, some legal scholars have argued that the ICC's request to states to surrender the Sudanese president Bashir is *ultra vires*.⁴⁰ Nonetheless, it is noteworthy that in several occasions the Court, in taking notice of the presence of Bashir in an African country has issued a decision finding that such a country had not complied with its duty to enforce the arrest warrant against the Sudanese president.⁴¹ As a matter of fact, the problem of immunity of third states' officials remains an open issue.

All in all, the law and practice of international and internationalized criminal tribunals have contributed significantly to the development of international law, by 'broaden[ing] as much as possible the protection of human rights and, by the same token, to make those who engage in heinous breaches of such rights criminally accountable'.⁴² Arguably, international criminal tribunals, and particularly the ICC, which requires to states parties to adopt domestic legislation implementing the Rome Statute,⁴³ may also potentially influence the development of domestic practice in favour of a rule lifting personal immunities in cases of international crimes. It is therefore foreseeable that, notwithstanding the persistent objections of certain

³⁹ ICC, Request to All States Parties to the Rome Statute for the Arrest and Surrender of Omar al Bashir, *Omar Hassan Ahmad al Bashir* (ICC-02/05-01/09-7), Pre-Trial Chamber ('PTC') I, 6 March 2009. P. Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?', 7 *Journal of International Criminal Justice* ('JICJ') (2009) 315-332; see contra D. Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities', *Ibid.*, 332-352.

⁴⁰ P. Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?', *supra* note no. 39, at 329.

⁴¹ ICC, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, *Omar Hassan Ahmad al Bashir* (ICC-02/05-01/09-139), PTC I, 12 December 2011; Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, *Omar Hassan Ahmad al Bashir* (ICC-02/05-01/09-140), PTC I, 13 December 2011.

⁴² A. Cassese, *International Criminal Law*, *supra* note no. 10, at 312.

⁴³ Under the principle of complementarity, the ICC exercise jurisdiction only when states are unwilling or unable to prosecute (Art. 17 ICCSt.). For the principle of complementarity to become truly effective, following ratification, States must also implement all of the crimes under the Rome Statute into domestic legislation.

states to lifting the rule on personal immunities, significant developments may occur in the future, possibly leading to the emergence of a customary rule on the matter.

3 AMNESTIES

Amnesties represent another obstacle to the prosecution of perpetrators of international crimes and, ultimately, to the effective exercise of the right to justice by victims of those crimes. An act of amnesty extinguishes the criminal nature of past offences, proscribing the prosecution of their authors. Amnesties are generally granted through a domestic law or a governmental decree, but have also been included in peace agreements between states or internal factions.⁴⁴ Despite being controversial in many aspects, amnesties have been extensively used throughout history in transitional context,⁴⁵ for instance following armed conflicts, civil unrest and military dictatorships. This is because amnesties have often proved to be a decisive factor in negotiations that have brought to an end armed conflicts or restored the rule of law after a prolonged dictatorship.

In present times, however, amnesty provisions have been defined as one of ‘the most controversial aspects of contemporary transitional justice.’⁴⁶ As a matter of fact, amnesties are ‘undeniably at odds with the demand of retribution, an affront to victims and survivors, and potentially a blow to the longer term prospects of establishing and strengthening legal institutions and the rule of law in transitional states.’⁴⁷ Although the practice of granting amnesties remains commonplace, a trend can be observed in national and international practice towards the limitation of their scope. In particular, amnesties are increasingly considered incompatible with gross human rights violations and international crimes.

A number of judicial decisions have been adopted by domestic courts finding amnesty laws to be in violation of the state’s obligations to prosecute and punish perpetrators of international crimes. For instance, in 2005 the Argentinean Supreme Court declared two amnesty laws adopted to shield from prosecution the authors of international crimes and serious violations of human rights, including enforced disappearances, to be unconstitutional

⁴⁴ Amnesties have been included, for instance, in the Lomé Peace Accord between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, 7 July 1999 (Art. IX), and in the Comprehensive Peace Agreement between the Government of the Republic of Sudan and the Sudan People’s Liberation Movement/Sudan People’s Liberation Army, 9 January 2005 (Art. 2).

⁴⁵ R.G. Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000), 46-59; for a comparative analysis of amnesty laws, see various contributions in F. Lessa and L.A. Payne, *Amnesty in the Age of Human Rights Accountability*, *supra* note no. 2, at 69-358; L. Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Oxford: Hart, 2008).

⁴⁶ M. Freeman and M. Pensky, ‘The Amnesty Controversy in International Law’, in F. Lessa and L.A. Payne, *Amnesty in the Age of Human Rights Accountability*, *supra* note no. 2, 42-65, at 42.

⁴⁷ *Ibid.*

and void on the basis of international law.⁴⁸ Likewise, the Supreme Court of Chile declared that amnesty laws do not bar the prosecution of those responsible for enforced disappearances.⁴⁹ It is argued that both these decisions were influenced by the developments occurred at the international level and particularly by the findings of human rights supervisory bodies, including the Inter-American Court of Human Rights ('IACtHR') that only a few years earlier had established that amnesties violate the general duty to respect and ensure human rights.⁵⁰

Even though it is generally recognised that no customary rule has crystallised for the prohibition of amnesty in cases of international crimes,⁵¹ it is worthwhile analysing the elements of international practice supporting the emerging trend towards the acceptance of such a prohibition. In particular, the following sub-sections will focus on the practice of human rights supervisory bodies and of international and internationalized criminal tribunals.

3.1 Amnesties and Emerging Trends in International Human Rights Law

An explicit prohibition of amnesties cannot be found in international human rights treaties, nor in other specialised treaties demanding, for instance, the prosecution of international crimes or of gross human rights violations.⁵² Nevertheless, human rights supervisory bodies have consistently found that amnesties are incompatible with international crimes and gross violations of human rights and that, accordingly, amnesties adopted with the aim of shielding alleged perpetrators of such crimes from prosecution violate conventional obligations. In particular, a review of the practice of human rights supervisory bodies reveals that amnesties are considered to be in violation not only of the duty of states to investigate gross human rights violations and to respect and ensure human rights but also of the obligation of states to guarantee the right to an effective remedy.

The Human Rights Committee ('HRC'), for instance, has increasingly referred to the right of the victim to an effective remedy when condemning the adoption of amnesty laws. For example, in relation to amnesties that some states had granted to perpetrators of acts of

⁴⁸ Supreme Court of Argentina, *Simón, Julio Héctor y otros*, causa 17.768, 14 June 2005. See also C. Bakker, 'A Full Stop to Amnesty in Argentina: The Simón Case', 3 JICJ (2005) 1106-1120.

⁴⁹ Supreme Court of Chile, *Juan Manuel Guillermo Contreras Sepúlveda y Marcelo Luis Manuel Moren Brito*, causa 571/2004, Res. No. 22267, 17 November 2004. See F. Lafontaine, 'No Amnesty or Statute of Limitation for Enforced Disappearance: The Sandoval Case before the Supreme Court of Chile', 3 JICJ (2005) 469-484.

⁵⁰ IACtHR, *Barrios Altos v. Peru*, Judgment (Merits), 14 March 2001, § 42.

⁵¹ M. Freeman and M. Pensky, 'The Amnesty Controversy in International Law', *supra* note no. 46, at 51-57.

⁵² *Ibid.*, at 44-51; N. Roth-Arriaza, *Impunity and Human Rights in International Law and Practice* (Oxford: Oxford University Press, 1995), at 58.

torture, the Committee has emphasised that such amnesties are incompatible with the duty of states to investigate violations and affect victims' right to remedy:

Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedoms from such acts within their jurisdiction and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.⁵³

The reasoning of the Committee is as follows: amnesties have as a consequence the end of prosecution and, implicitly, of any official investigation of the crime. From this perspective, amnesty provisions not only violate the duty of states to prosecute human rights violations, but also the corresponding right of victims to justice, that is the right to the criminal prosecution of offenders, an integral component of victim's right to an effective remedy, as has been set out in Chapter III.

Notably, even though the recent General Comment on Article 2 does not completely rule out amnesties,⁵⁴ no amnesty legislation in cases of international crimes and of gross violations of human rights has been found to be compatible with the ICCPR. The aforementioned pronouncement against amnesties was related to acts of torture.⁵⁵ The Committee also extended such criticism to amnesties covering crimes against humanity and war crimes,⁵⁶ and to serious human rights violations, including extra-judicial executions that should 'in no case enjoy immunity, inter alia, through an amnesty law',⁵⁷ enforced disappearances, inhuman and degrading treatment.⁵⁸

The development of a comprehensive right to justice has also reinforced the position of Inter-American institutions towards the outlawing of amnesties. Initially, the Inter-American bodies considered amnesty laws in violation of the right to fair trial to the extent that they had precluded victims from their right to initiate criminal proceedings provided by

⁵³ HRC, *General Comment No. 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment* (Art. 7), 10 March 1992, § 15.

⁵⁴ The HRC outlaws only those amnesties that relieves perpetrators of serious human rights violations from 'personal responsibility', see HRC, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 26 May 2004, § 18.

⁵⁵ See *supra* note no. 53.

⁵⁶ For instance, in its Concluding Observations on Colombia of 2004, the HRC urged the state not to grant impunity to persons who had committed those crimes (*Concluding Observations of the Human Rights Committee: Colombia*, UN Doc. CCPR/CO/80/COL, 25 March 2004, § 8); similarly, in its Concluding Observation on Cambodia of 1999, the Committee recommended the state to bring alleged perpetrators of crimes against humanity to justice (*Concluding Observations of the Human Rights Committee: Cambodia*, UN Doc. CCPR/C/79/Add/08, 22 July 1999, § 13).

⁵⁷ HRC, *Concluding Observations of the Human Rights Committee: Niger*, UN Doc. CCPR/C/79/Add.17, 29 April 1993, § 7.

⁵⁸ HRC, *Concluding Observations of the Human Rights Committee: Peru*, UN Doc. CCPR/C/79/Add.72, 18 November 1996, § 22; *General Comment No. 31, supra* note no. 54, § 17.

domestic law. In other words, amnesty laws were incompatible with victims' rights only insofar as domestic law granted victims the right to bring charges in criminal proceedings.⁵⁹

However, an important step was made in 1996 by the Commission in the case of *Garay Hermosilla v. Chile*, where the amnesty brought into force for and by the previous military regime allegedly responsible for disappearances, summary and extrajudicial executions and torture was at stake. In that case, the Commission held that, irrespective of the rights of victims under domestic law, the state was obliged to pursue the various stages of criminal proceedings in order to guarantee the right to justice of the victim and his family.⁶⁰

The progressive development of the right to justice has had the effect of completely ruling out amnesties for serious violations of human rights. In the view of the Commission, amnesty laws leave the crimes without judicial effect and deprive 'the victims and their families of any legal recourse through which they might identify those responsible for violating their human rights during the military dictatorship, and to bring them to justice.'⁶¹ This has been considered contrary to both Article 8 and Article 25. The dismissal of criminal charges as a consequence of an amnesty provision has been thus considered in violation of the right to justice of the victims. Although emphasis was put on the duty to investigate and to ensure compensation, the Commission clarified that punishment is also an element of redress required by the American Convention and that the establishment of a truth commission cannot be regarded as a substitute for the judicial process required.⁶²

It is remarkable that the Inter-American Court on Human Rights ('IACtHR') has developed its jurisprudence in relation to the issue of amnesties in parallel with its jurisprudence on the right to justice. Initially, the Court did not rule on the admissibility of amnesties in general but nonetheless adopted a critical position. In the *Castillo Páez* case, the Court, dealing with a crime which had been subject to the Peruvian amnesty, observed that this law 'obstructs investigation and access to the courts and prevents the victim's next of kin from learning the truth and receiving the reparations to which they are entitled.'⁶³ The Court

⁵⁹ Inter-American Commission of Human Rights ('IAComHR'), Case 10.147, 10.181, 10.240, 10.262, 10.309, 10.311, *Alicia Consuelo Herrera et al. v. Argentina*, 2 October 1992, § 50; Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375, *Mendoza et al. v. Uruguay*, 2 October 1992, § 54.

⁶⁰ IAComHR, Case 10843, *Garay Hermosilla v. Chile*, 15 October 1996, § 64; see also Case 10.480, *Lucio Parada Cea et al. v. El Salvador*, 27 January 1999, § 119.

⁶¹ IAComHR, *Garay Hermosilla*, *supra* note no. 60, § 71; IAComHR, Case 11.725, *Carmelo Soria Espinoza (Chile)*, 19 November 1999, § 90.

⁶² IAComHR, *Garay Hermosilla*, *supra* note no. 60, §§ 41, 58 and 77; *Carmelo Soria Espinoza (Chile)*, *supra* note no. 61, § 105.

⁶³ IACtHR, *Castillo Páez v. Peru*, Judgment (Reparations and Costs), 27 November 1998, § 105.

also reiterated that victims, pursuant to articles 8(1) and (25), must have judicial recourse so that those responsible for the violations could be tried and reparations obtained.⁶⁴

The current position of the Court is that self-amnesty laws are generally incompatible with the American Convention. The failure to prosecute and the consequent violation of victims' right to justice are central to the criticism of the amnesty laws. In cases of serious violations, such as torture, extrajudicial, summary or arbitrary execution and forced disappearances, an amnesty is inadmissible on two grounds: first, it violates the general duty to respect and ensure human rights.⁶⁵ Self-amnesty laws are equated with blanked impunity and are banned because they erode public confidence in state institutions. Second, and most relevantly for the present analysis, amnesty laws violate the right to judicial protection against human rights violations (Art. 25).⁶⁶ As the Court affirmed: 'Self-amnesty laws lead to the defenselessness of victims and perpetuate impunity; therefore they are manifestly incompatible with the aims and spirit of the Convention.'⁶⁷ In particular, the Court criticised the fact that amnesty laws obstruct investigation and access to justice and prevent the victims and their relatives from knowing the truth and receiving reparation.⁶⁸

In the same vein, there is now a consensus on the absolute ban not only of self-amnesty laws, but also of amnesties for crimes against humanity. The Court took this view in *Masacre de Mapiripán v. Colombia*, *Almonacid-Arellano v. Chile*, and *La Cantuta v. Peru*.⁶⁹ The view that crimes against humanity cannot be amnestied reflects the growing conviction that serious violations of human rights amounting to international crimes should not go unpunished. It is likely that the Court's ban on amnesties will gradually broaden to include other serious human rights violations. Indeed, as said above, the Court has recently characterised the right to access to justice in cases of serious human rights violations as *jus cogens*.⁷⁰ This would suggest that in these cases the rights of victims to have human rights offenders prosecuted may not be compromised (such as for the need for national reconciliation and consolidation of democracy), thus leaving no room for amnesties.

⁶⁴ *Ibid.*, § 106.

⁶⁵ IACtHR, *Barrios Altos v. Peru*, *supra* note no. 50, § 42.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*, § 43.

⁶⁸ *Ibid.*

⁶⁹ IACtHR, *Mapiripán Massacre v. Colombia*, Judgment (Merits, Reparations, and Costs), 15 September 2005, § 304; *Almonacid-Arellano et al. v. Chile*, Judgment (Preliminary Objections, Merits, Reparations, and Costs), 26 September 2006, § 105; *La Cantuta v. Peru*, Judgment (Merits, Reparations, and Costs), 29 November 2006, § 168.

⁷⁰ IACtHR, *Goiburú et al v. Paraguay*, Judgment (Merits, Reparations and Costs), 22 September 2006 §§ 84, 131; *La Cantuta v. Peru*, *supra* note no. 69, § 157.

This position is also shared by the African Commission on Human and Peoples' Rights ('AfrComHPR'), which has declared that 'an amnesty law adopted with the aim of nullifying suits or other actions seeking redress that may be filed by the victims or their beneficiaries [...] cannot shield that country from fulfilling its international obligations under the Charter.'⁷¹ In addition, the Commission has also established that '[t]he granting of amnesty to absolve perpetrators of human rights violations from accountability violates the right of victims to an effective remedy.'⁷²

In contrast to other human rights bodies, the European human rights system has not had an opportunity to develop a detailed jurisprudence on amnesties. The case law in this respect is scarce and out-dated. For example, mention can be made to the *Dujardin v. France* case,⁷³ where the European Commission of Human Rights ('EComHR') was called to deal with an amnesty enacted in New Caledonia. Notably, the Commission did not find a violation of the Convention, stressing the exceptional character of the amnesty, and left to the state with a margin of appreciation to determine the measures to resolve conflicts between the various communities of the islands. In that case, the Commission considered that reconciliation was a legitimate aim that justified certain restrictions regarding the punishment of the offenders. The Commission thereby found that:

As with any criminal offence, the crime of murder may be covered by an amnesty. That in itself does not contravene the Convention unless it can be seen to form part of a general practice aimed at the systematic prevention of prosecution of the perpetrators of such crimes.⁷⁴

In sum, individual rights of the victims were not regarded as obstacles to the proclamation of amnesty. It should be noted that the amnesty in *Dujardin* was evaluated only under Art. 2 of the Convention. The right to an effective remedy was not considered to be at issue. Nonetheless, it must be pointed out that, at the time of that decision, the doctrine on victims' rights to justice had not yet developed. For this reason, it is doubtful whether the same decision would currently be taken, now that the right to an official investigation and criminal prosecution for serious violations are firmly established as integral elements of the right to remedy.

⁷¹ AfrComHPR, *Malawi African Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme v. Mauritania* (Comm. Nos. 54/91-61/91-96/93-98/93-164/97-196/97-210/98), 11 May 2000, § 83.

⁷² AfrComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance*, 2001, Principle C (d).

⁷³ EComHR, *Dujardin et al. v. France* (App. No. 16734/90), Decision, 2 September 1991.

⁷⁴ *Ibid.*, at 4.

Though the Court has not had to deal with the issue of amnesty, this presumption can be derived from cases where criminal authorities have been criticised for being reluctant to examine cases of alleged life-endangering behaviour. Presumably, the more the concept of criminal accountability are read into the victim's right to remedy, the greater the prospect that the proclamation of an amnesty covering serious human rights violations will diminish. Though the Commission allowed for exceptions from criminal prosecution in the interest of general human rights violations it is doubtful whether the Court would be prepared to make similar concessions in the context of victims' rights.

3.2 Amnesties and International Criminal Tribunals

The law and practice of international and internationalized criminal tribunals appears consistent with the trend emerged under international human rights law prohibiting amnesties in cases of international crimes and gross human rights violations. Indeed, several elements indicate that an amnesty provision cannot bar criminal prosecutions before international criminal tribunals.⁷⁵

This principle has been set out explicitly in Article 10 of the Statute of the Special Court of Sierra Leone ('SCSL'), which establishes: 'An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution'. The SCSL reiterated the non-applicability of amnesties to crimes under its jurisdiction in the *Kallon et al.* case and in the *Kondewa* case in which it ruled that amnesties granted by the Lomé Peace Agreement could not be considered as a bar to prosecution before it.⁷⁶

Explicit provisions establishing that amnesties do not bar criminal prosecutions before international criminal tribunals are also present in the Law for the Establishment of the Extraordinary Chambers in the Courts of Cambodia ('ECCC'), which provides that there should be no amnesty for the crimes committed in Cambodia by the Khmer Rouge between 1975 and 1979,⁷⁷ and in the Statute of the Special Tribunal for Lebanon ('STL').⁷⁸

⁷⁵ M. Frulli, 'Amnesty,' in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press), 243-244.

⁷⁶ SCSL, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, *Kallon, Norman and Kamara* (SCSL-2004-15-16-17), Appeals Chamber ('AC'), 13 March 2004, § 71; Decision on Lack of Jurisdiction / Abuse of Process: Amnesty Provided by the Lomé Accord, *Kondewa* (SCSL-2004-14 AR 72), AC, 25 May 2004. For a comment on the Kallon decision, see A. Cassese, 'The Special Court and International Law: The Decision Concerning the Lomé Agreement Amnesty', 2 *JICJ* (2004) 1130-1140.

⁷⁷ Art. 40, ECCC Law; see also Decision on Ieng Sary's Rule 89 Preliminary Objection (Ne bis in idem and Amnesty and Pardon), *Ieng Sary*, Trial Chamber, 3 November 2011.

It is therefore noteworthy that the ICC Statute does not contain an explicit provision ruling out amnesties for crimes under its jurisdiction. Accordingly, it has been observed that it remains unclear whether an amnesty law barring the prosecution of persons accused of crimes falling within the jurisdiction of the ICC would be recognised by the Court or whether the Prosecutor could disregard such an amnesty law and continue with an investigation and prosecution of a person subject to the amnesty. It is submitted that the ICC statutory framework contains several elements precluding amnesties from barring prosecution. First, in principle, national amnesty laws would be incompatible with the primary objective of the Court, that is ending impunity for the perpetrators of the most serious crimes of concern to the international community by ensuring their effective prosecution.⁷⁹

Furthermore, based on Article 17 of the Rome Statute, the Court may declare a state as unwilling to prosecute, and hence acquire jurisdiction over the case, if an amnesty was granted with the purpose of shielding a person from criminal responsibility.⁸⁰ In that case, the Court will have to establish whether the decision to grant an amnesty is in reality a signal of the unwillingness of the State genuinely to prosecute.⁸¹ In other words, only amnesties that have not been adopted with the purpose of granting impunity to certain individuals would be compatible with Article 17 of the ICC Statute.

It has been argued, however, that the Court would still retain a margin of discretion to allow amnesties for crimes under its jurisdiction.⁸² The first possibility to recognise an amnesty under the ICC Statute may be derived from the discretionary power of the Prosecutor to determine that there is no reasonable basis to proceed to an investigation under Article 53, when such an investigation would not serve the interests of justice. In particular, it remains unclear whether prosecuting an individual subject to an amnesty law could be considered in the interest of justice, especially in the context of countries in transition.

Moreover, a possibility of the ICC recognising an amnesty law can be implied from Article 16, which gives the Security Council the power to stay a prosecution if it considers that such a prosecution would threaten international peace and security. Since amnesty laws

⁷⁸ Art. 6 STLSt.

⁷⁹ Preamble, ICCSt.

⁸⁰ In particular, Art. 17(2)(a) ICCSt. establishes that 'In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5'.

⁸¹ Y. Navqi, 'Amnesties and the ICC', available online at <http://www.peaceandjusticeinitiative.org/implementation-resources/amnesties-and-the-icc> (last visited on 26 June 2013).

⁸² *Ibid.*

are often used to end conflicts and assist countries in transition, it has been suggested that Article 16 would allow the ICC to give recognition to amnesty laws.⁸³ All in all, until the ICC has considered the matter, the possible recognition of amnesties law remains open to question. However, given the primary objective of the ICC to prosecute perpetrators of international crimes, and considering the emerging trend at the international level analysed above, negotiating impunity for crimes in the ICC subject-matter jurisdiction would no longer seem a viable option.

⁸³ *Idem*, 'Amnesty for War Crimes: Defining the Limits of International Recognition', 85 *International Review of the Red Cross* (2003) 583-626, at 592-593.

4 STATUTORY LIMITATIONS

As mentioned above, statutory limitations, a common feature in the criminal procedure of many states, are procedural rules that prescribe that after a certain time period has passed from the alleged offence, no prosecution may be initiated. The rationale for such rules is threefold: first, gathering evidence after that a considerable number of years has passed from the alleged offenses could prove an arduous task, hindering not only prosecution, but also the defence of the accused; second, the preventative objective of criminal prosecutions would be considerably reduced; and finally, the interest of the society in criminal prosecution is thought to diminish over time.⁸⁴

Nevertheless, a trend is emerging holding that these rationales do not apply in the case of international crimes and that, therefore, statutory limitations should not bar prosecutions of such crimes. This is so for two main reasons, as pointed out by a number of legal scholars: first, the abhorrent nature of international crimes demands that perpetrators are brought to justice, regardless of the time that has passed from the committed crime;⁸⁵ moreover, as stated in the introduction to this Chapter, in the aftermath of mass atrocities, it is often difficult to initiate criminal prosecutions, either for logistical, political or other factors, which may be taken away by the passage of time.⁸⁶

A number of international documents and decisions have explicitly ruled out applicability of statutory limitations to serious violations of human rights amounting to international crimes referring to the need to ensure victims' right to reparation.⁸⁷ The principle of imprescriptibility of international crimes has also been affirmed in three international treaties: the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, and the Inter-American Convention on Forced Disappearance of Persons (Art. 7). Furthermore, this principle has

⁸⁴ M. Delmas-Marty, 'La responsabilité pénale en échec (prescription, amnistie, immunités)', in A. Cassese and Id. (eds), *Jurisdictions nationales et crimes internationaux* (Paris: Presses Universitaires de France, 2002) 613-652, at 617.

⁸⁵ A. Cassese, *Cassese's International Criminal Law* (revised by A. Cassese, P. Gaeta, L. Baig, M. Fan, C. Gosnell and A. Whiting) (Oxford: Oxford University Press, 2013), at 313-315.

⁸⁶ M. Delmas-Marty, 'La responsabilité pénale en échec (prescription, amnistie, immunités)', *supra* note no. 84, at 617-618.

⁸⁷ In this respect, a distinct legal scholar has observed that the imprescriptibility of international crimes, provided for a vast number of domestic legislations and supported by a consistent practice, shall be considered as a general principle of law. See B. Conforti, *Diritto internazionale*, *supra* note no. 10, at 212. Cf. V. Starita, 'La questione della prescrittibilità dei crimini contro l'umanità: in margine al caso Priebke', 81 *Rivista di diritto internazionale* (1998) 86-109, at 96 ff.; R.A. Kok, *Statutory Limitations in International Criminal Law* (The Hague: T.M.C. Asser Press, 2007), at 345 ff.

been affirmed in a number of soft-law documents. For instance, in his final report to the Commission on Human Rights, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Theo van Boven, observed that:

It is sometimes contended that as a result of passage of time the need for reparations is outdated and therefore no longer pertinent. [...] the application of statutory limitations often deprives victims of gross violations of human rights of the reparations that are due to them. The principles should prevail that *claims relating to reparations for gross violations of human rights shall not be subject to a statute of limitations*. In this connection, it should be taken into account that the effects of gross violations of human rights are linked to the most serious crimes to which, according to authoritative legal opinion, statutory limitations shall not apply. Moreover, it is well established that for many victims of gross violations of human rights, the passage of time has no attenuating effect; on the contrary, there is an increase in post-traumatic stress, requiring all necessary material, medical, psychological and social assistance and support over a long period of time.⁸⁸

A review of the practice of human rights bodies reveals the growing awareness that the application of statutes of limitation legislations in cases of international crimes and gross violations of human rights may be in violation of conventional rights and, in particular, of victim's right to an effective remedy.

In recent years the Inter-American Court of Human Rights has repeatedly stressed its opposition to legislation that bars the prosecution of human rights offenders, such as statutes of limitation.⁸⁹ In the *Trujillo Case*, the Court held that:

[P]rovisions regarding statutes of limitations and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance.⁹⁰

In addition, the application of statutes has been considered to be in violation of the right to justice if the criminal case has ultimately extinguished as a result of long delays due to reluctance to investigate and prosecute or obstruction of justice.⁹¹ More recently, the Court has progressively moved towards the complete ban of statutes of limitation and any time-bar for the prosecution of grave human rights violations, regardless of their intent.⁹²

⁸⁸ Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final report submitted by Mr. Theo van Boven*, UN Doc. E/CN.4/Sub.2/1993/8, 2 July 1993, § 135 (emphasis added).

⁸⁹ IACtHR, *Barrios Altos v. Peru*, *supra* note no. 50, § 41; *El Caracazo v. Venezuela*, Judgment (Reparations and Costs), 29 August 2002, § 119.

⁹⁰ IACtHR, *Trujillo Oroza v. Bolivia*, Judgment (Reparations and Costs), 27 February 2002, § 106.

⁹¹ IACtHR, *Las Palmeras v. Colombia*, Judgment (Reparations and Costs), 26 November 2002, §§ 69-70.

⁹² IACtHR, *Rochela Massacre v. Colombia*, Judgment (Merits, Reparations and Costs), 11 May 2007, § 292.

Likewise, the European Court of Human Rights ('ECtHR') has criticised the suspension of criminal sentences, not only because it renders the protection of the rights violated ineffective,⁹³ but also because it violates victims' right to an effective remedy. In the *Abdulsamet* case, regarding allegations of torture of a local political leader by agents of the Turkish police, the Court held that

[W]here a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purposes of an "effective remedy" that criminal proceedings and sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible.⁹⁴

In particular, the Court reiterated that when an agent of the state is responsible of an act torture, the obligation to provide an effective remedy to the victim in question requires the state to identify and prosecute those responsible for criminal violations. In those circumstances, civil compensation as an alternative to the criminal conviction could not serve as an adequate remedy for the damage suffered by the victim. Accordingly, the application of measures that impede the imposition of a criminal sanction to those responsible for the human rights breaches violates the right to effective remedy under Article 13 of the European Convention.⁹⁵

It is submitted that these findings, like those made in relation to amnesties, support the argument put forward in Chapter III according to which prosecution of offenders is an integral element of the right to an effective remedy.

As far as the prosecution of international crimes by international criminal tribunals is concerned it is generally agreed that statutes of limitations do not apply since there is no provision in customary international law establishing a limitation period. Accordingly, it has been argued that provisions prohibiting statutes of limitations within the legal framework of international criminal tribunals are redundant.⁹⁶

An explicit provision ruling out statutes of limitation for the prosecution of international crimes by international criminal courts can be, however, found in the ICC and the ECCC legal framework. Article 29 of the ICC Statute establishes that crimes within the Court's jurisdiction are not subject to any statute of limitation. Moreover, pursuant to Article 17 of the Statute, the Court will be granted jurisdiction, under the principle of

⁹³ See e.g. ECtHR, *Mastromatteo v. Italy* (App. No. 37703/97), Judgment (Merits), 24 October 2002, § 72.

⁹⁴ ECtHR, *Abdulsamet Yaman v. Turkey* (App. No. 32446/96), Judgment (Merits and Just Satisfaction), 2 November 2004, § 55.

⁹⁵ See also ECtHR, *Serdar Güzel v. Turkey* (App. No. 39414/06), Judgment (Merits and Just Satisfaction), 15 March 2001.

⁹⁶ H. Kreicker, 'Statute of Limitations', in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice*, *supra* note no. 75, 522-524, at 522.

complementarity, if a state is unable to initiate a prosecution due to a statute of limitations applicable to the crimes in question under domestic law. Similarly, Articles 4 and 5 of the Cambodian Law on the Establishment of the ECCC provide that statutes of limitations do not apply to the international crimes falling within the jurisdiction of the Chambers.

5 THE PRINCIPLE OF NON-RETROACTIVITY OF CRIMINAL LAW

As noted above, often trials for gross human rights violations and international crimes only start many years, even decades, after the offences have taken place. This is so because these violations are often associated with armed conflicts or civil disorders which may jeopardize the activities of judicial bodies and it may take some time to re-establish the legal order within a country which has been affected by mass atrocities. Criminal trials for past violations may require a determination of the law applicable to events that commenced or were concluded long ago. Indeed, the *nullum crimen sine lege* principle, a general principle of criminal law, prohibits the criminalisation of acts committed prior to the entry into force of a rule banning such conduct as a crime.⁹⁷ A derivative of this principle is the principle of non-retroactivity of criminal law, which prohibits the prosecution and punishment of an individual for an act which did not constitute a criminal offence at the time when it was committed.

The principle of non-retroactivity of criminal law may thus constitute a major hurdle in the realisation of victim's right to justice. Nevertheless, the scope of this principle has been progressively reduced thanks to the development of international law, potentially broadening the possibility to bring criminals to justice. In particular, international criminal law has expanded and become a more precise and certain area of law due to both the ratification by a growing number of states of international treaties criminalising the conduct of individuals⁹⁸ and to international case law interpreting specific elements of the crimes or contributing to the gradual crystallisation of crimes under customary international law. Under these circumstances, the principle of non-retroactivity has evolved in such a way as to admit two major exceptions, reflected in most human rights instruments: the principle is not violated when an act, even though it was not punishable under national criminal law at the time when it was performed, was nevertheless criminalised either (i) under international law, or (ii) according to the general principles of law recognised by the community of the nations.⁹⁹

⁹⁷ A. Cassese, *International Criminal Law*, *supra* note no. 10, at 43-47.

⁹⁸ E.g., Art. 1 of the Convention on the Prevention and Punishment of Genocide states: 'The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.'

⁹⁹ These two major exceptions are explicitly provided for in Art. 15 ICCPR, which provides as follows: '1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, *under national or international law*, at the time when it was committed. [...] 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the *general principles of law* recognized by the community of nations.' (emphasis added). See also Art. 7 ECHR.

It remains true that, due to the vague content of these two exceptions, particular attention should be paid to the degree of accessibility and foreseeability¹⁰⁰ of the criminal rules they allow to be applied retrospectively.¹⁰¹ This position has also been confirmed by the practice of human rights supervisory bodies. For instance, the European Court of Human Rights, in the case of *Streletz, Kessler and Krenz v. Germany* – concerning the conviction of former senior East German officials and a border guard for the shooting of people who tried to cross the Berlin Wall – held that the prohibition of such conduct was well established under international law when the facts occurred. Accordingly, although not criminalised under the criminal code of the German Democratic Republic at the material time, the European Court found that these acts constituted offences defined with sufficient accessibility and foreseeability under international law.¹⁰²

Reference to international law, especially when international customary rules are at stake, as well as to general principles of law, may easily become a dangerous Pandora's box in the hands of a tyrannical judicial power. However, the growing affirmation of a norm in support of criminal accountability for international crimes has increasingly lead domestic courts to resort to these exceptions.

In particular, it is interesting to note that throughout the last decades, a number of criminal statutes have been adopted in domestic systems incorporating international crimes. The prevalent view is that these statutes can be applied retrospectively without raising issues of retroactivity, because the conducts at issue were already criminalized under international law. Accordingly, when new incorporating legislation is passed concerning conduct previously criminalised in international law, allowing courts to exercise jurisdiction over such conduct, this legislation does not have the function of creating *new* crimes. Rather, it has a

¹⁰⁰ In cases dealing with the *nullum crimen* principle, the European Court has applied the test of accessibility and foreseeability when determining whether the conduct in question falls within the scope of a criminal statute. For an elaboration of these principles, see e.g. ECtHR, *The Sunday Times v. United Kingdom*, Judgment (Merits), 26 April 1979, at § 49.

¹⁰¹ See in this respect the analysis carried out by the ECtHR in a number of cases dealing with the retroactive application of criminal law incorporating certain conduct which was already criminal under international law. E.g., in *Kolk and Kislyiy v. Estonia* (App. No. 23052/04, 24018/04), Decision (Admissibility), 17 January 2006, the Court held, at p. 9: '... [E]ven if the acts committed by the applicants could have been regarded as lawful under the Soviet law at the material time, they were nevertheless found by the Estonian courts to constitute crimes against humanity under international law at the time of their commission. ... The Court thus considers groundless the applicants' allegations that their acts had not constituted crimes against humanity at the time of their commission and that they could not reasonably have been expected to be aware of that.' For a comment on this decision, see A. Cassese, 'Balancing the Prosecution of Crimes Against Humanity and Non-Retroactivity of Criminal Law: The Kolk and Kislyiy v. Estonia Case Before the ECHR', 4 *JICJ* (2006) 410-418.

¹⁰² ECtHR, *Streletz, Kessler and Krenz v. Germany* (App. Nos. 34044/96, 35532/97 and 44801/98), Judgment (Merits), 22 March 2001, § 89.

‘jurisdictional function’.¹⁰³ In other words, the incorporating legislation is only a tool which enables national courts to apply the relevant rule of international law criminalizing the conduct.¹⁰⁴ From this perspective, the incorporating legislation does not raise issues of foreseeability under human rights law, as the alleged perpetrator should have been aware of the international prohibition.¹⁰⁵ Accordingly, it is increasingly accepted that an incorporating law could be applied retrospectively without violating the principle of non-retroactivity, provided that the acts at issue were already prohibited by international law, at least in a general way (such as being based on the general principles of law), at the time the offence was committed.¹⁰⁶

Since certain conduct have long been recognised as criminal under international law, and since states are increasingly adopting legislation incorporating such crimes in their criminal codes, the principle of non-retroactivity of criminal law is likely to prove less and less successful as a defence in the next years. Consequently, even though the current interpretation of the principle non-retroactivity of criminal law has not been grounded on the affirmation of a victim’s right to justice, but rather on the willingness not to leave the most heinous atrocities unpunished, it can be reasonably assumed that this principle is not going to be a major obstacle to victim’s justice in the forthcoming years.

¹⁰³ In this sense, see e.g., *Re Extradition of Demjanjuk*: a case concerning an Israeli extradition request of an alleged guard at the Treblinka concentration camp during World War II. The appellant argued that, inter alia, the Israeli criminal statute under which the accused was sought was retroactive, since Israel did not come into existence until 1948. The Court stated that: ‘The Israeli statute does not declare unlawful what had been lawful before; rather, it provides a new forum in which to bring to trial persons for conduct previously recognized as criminal. ... Respondent is charged with offenses that were criminal at the time they were carried out. ... The statute is not retroactive because it is jurisdictional and does not create a new crime. Thus, Israel has not violated any prohibition against the ex post facto application of criminal laws which may exist in international law.’ United States District Court North Dakota – Ohio, Eastern Division, *Re Extradition of Demjanjuk* [1985] 612 F.Supp. 544, at 567.

¹⁰⁴ Without such legislation, the state would face two obstacles: (i) there would be no specification of the applicable penalty; and (ii) the courts could not assert their extraterritorial jurisdiction over such crimes.

¹⁰⁵ On this point it has been observed that ‘[t]he perpetrator of an international crime need not know when committing a crime that he is breaching international law for him to be convicted for a breach of that body of law, but “the principle of legality requires that the crime charged be set out in a law that is accessible and that it be foreseeable that the conduct in question may be criminally sanctioned at the time when the crime was allegedly committed.”’ G. Mettraux, *International Crimes and the ad hoc Tribunals* (Oxford: Oxford University Press, 2005), at 17, citing ICTY, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, *Hadžihasanović* (IT-01-47-AR72), AC, 16 July 2003, § 34.

¹⁰⁶ I expand on this issue in V. Spiga, ‘Non Retroactivity of Criminal Law: A New Chapter in the Hissène Habré Saga’, 9 *JICJ* (2011) 5-23.

6 CONCLUDING REMARKS

This Chapter has attempted to analyse the main obstacles to the prosecution of offences, and ultimately to victim's right to justice. In particular, it has been demonstrated that a trend seems to be emerging according to which these obstacles do not apply to prosecutions of international crimes and gross human rights violations. In other words, the application of measures barring prosecution has been progressively found to be inconsistent with state's obligations under international law when serious violations of rights are at stake.

Both domestic and international practice indicates that in cases of international crimes and gross human rights violations bars to prosecution have been either limited in scope or removed altogether. Immunity for state officials has been gradually restricted and it is a widely shared view that functional immunities should not bar prosecutions of state officials accused of international crimes. Amnesties, despite remaining in place in many systems, have been increasingly outlawed in cases of gross violations of human rights and international crimes. In view of the abhorrent nature of these violations and of the difficulties that states may encounter in initiating a criminal action in the immediate aftermath of the events, it is also increasingly the case that perpetrators of international crimes are being prosecuted even after a lapse of time, with statutory limitations being found to be inapplicable. In the same vein, it has been shown that a restrictive interpretation is emerging in relation to the principle of non-retroactivity of criminal law, allowing for prosecutions of crimes that were not criminalised under national law at the time of the events, provided that they were already prohibited under international law.

It is argued that the emerging trends highlighted in this Chapter are consistent with the affirmation of a state's obligation to prosecute international crimes and gross violations of human rights, as discussed in Chapter III. Most importantly, for the purposes of the analysis carried out in this thesis, it is interesting to observe that the validity of obstacles to prosecution has also been progressively reduced in view of the fact that they have been found in violation of the right to an effective remedy for victims. From this perspective, the emerging trends analysed in this Chapter can also be viewed as supporting the argument advanced in Chapter III according to which a right to justice, understood as a right to the prosecution of offenders, is emerging as an integral component of a victim's right to an effective remedy, at least in cases of gross violations of human rights and international crimes.

It is true, however, that certain obstacles to the prosecution of perpetrators of international crimes remain. In particular, we have seen in this Chapter that the fight against impunity and the demands of justice coming from the victims may be set aside when traditional prerogative of states are at stake, such as personal immunities of senior state officials, or when mechanisms shielding perpetrators from accountability, such as amnesties, are necessary to bring an armed conflict to an end. Nonetheless, it has also been shown that these obstacles are not considered a bar to prosecutions of international crimes by international and internationalized courts and tribunals. It is submitted that the practice of these bodies, as well as their legal framework, may come to influence decisions taken at the domestic level. Consequently, in the long run one can expect that international courts and tribunals will offer a valid contribution to the development of a norm which prohibits any obstacles to prosecution of international crimes and, eventually, to the effective exercise of the right to justice for victims of such crimes.

Chapter V

Victims' Right to Justice and Participation in Criminal Proceedings

1 INTRODUCTION

The analysis carried out in the previous chapters on the scope of redress reveals a strong convergence in principles and standards applicable to victims of gross human rights violations. In particular, reparative approaches that only include compensation and declarative relief have been increasingly considered inadequate in many cases of human rights violations. The spectrum of remedies recommended by human rights supervisory bodies suggests that the current international legal standards demand the right to justice, understood as the right of the victims to the determination of the criminal liability of those responsible for such violations, as an integral element of victims' redress in the case of serious human rights violations.

Reading criminal justice into victims' rights also necessitates a reconsideration of the role and the rights of victims in criminal proceedings. Arguably, the prosecution and punishment of wrongdoers can only have a remedial function if victims are not treated as objects, but rather as subjects of these proceedings.¹ Indeed, if victims have a right to the prosecution of human rights offenders as an integral component of their right to remedy, it would seem legitimate to assert that they should be granted corresponding procedural rights in the criminal process.

This position has been increasingly confirmed in the last three decades. A number of documents have been adopted at the international and regional levels acknowledging the importance of considering victims' concerns in the criminal process. Starting with the UN *Basic Principles of Justice for Victims of Crime and Abuse of Power* in 1985² and the Council of Europe Recommendation of the same year,³ international legal norms began to reflect the idea that victims need to be treated with compassion and respect for their dignity, and that they are entitled to redress for their suffering in terms of access to justice and reparation. Furthermore, a number of international instruments, as well as the practice of human rights

¹ International Commission of Jurist, *The Right to a Remedy and Reparation for Gross Human Rights Violations* (Geneva: International Commission of Jurist, 2006), at 169.

² UN General Assembly ('UN GA'), *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN Doc. A/RES/40/34, 29 November 1985.

³ Council of Europe, Committee of Ministers, *Recommendation No. R (85) 11 of the Committee of Ministers to Member States on the Position of the Victim in the Framework of Criminal Law and Procedure*, 28 June 1985.

supervisory bodies, have consistently supported the view that victims should be granted some participatory rights in criminal proceedings in order to promote and protect their right to justice.

Consequently, it is necessary to question whether participation can be considered an essential component of victims' right to justice, and if so, to what extent. As this Chapter will discuss, this issue is not straightforward. The role that victims play in criminal proceeding has been generally left to states' discretion. Whereas victims' rights in criminal proceedings have been traditionally recognised in civil law countries,⁴ it is a largely unfamiliar concept to common law countries like the United States where victims may be called to testify as witnesses but play no further role in the proceedings and must bring a separate civil action if they wish to claim damages or another remedy for harm related to the crime.⁵

The aim of this Chapter is therefore that of identifying the emerging trends in the matter of victim participation in criminal justice proceedings. With this aim in mind, this Chapter focuses on two main issues: first, it examines United Nations and regional human rights instruments, as well as the practice of human rights bodies, with the view to determining the current state of the emerging trends relating to victims' participatory rights in criminal proceedings. Second, it analyses the current practice in several domestic jurisdictions in relation to victim participation in criminal proceedings, with a particular emphasis on jurisdictions belonging to the common law and civil law traditions. In particular, special attention will be devoted to those mechanisms that allow victims to start penal action against the alleged offenders or to challenge prosecutorial decisions not to initiate or to continue investigation or prosecution, as these rights are directly relevant to the concrete enforcement of the victim's right to justice.

⁴ M. Chiavario, 'Private Parties: The Rights of the Defendant and the Victim', in M. Delmas-Marty and J. R. Spencer (eds), *European Criminal Procedures* (Cambridge: Cambridge University Press, 2002) 541-593, at 542-547.

⁵ See generally D.E. Beloof, P.G. Cassel, and S.J. Twist, *Victims in Criminal Procedure*, 3rd ed. (Durham: Carolina Academic Press, 2010); G.P. Fletcher, *With Justice for Some: Protecting Victims' Rights in Criminal Trials* (Reading: Addison Wesley, 1996); but see also W.T. Pizzi, 'Victims' Rights: Rethinking Our Adversarial System', *Utah Law Review* (1999) 349-368.

2 VICTIMS' RIGHTS IN CRIMINAL PROCEEDINGS: A THEORETICAL BACKGROUND

Before assessing the international and comparative legal framework on the role and the rights of victims in criminal proceedings, it seems necessary to briefly address some theoretical aspects of victims and criminal justice models. Most criminal justice models do not protect and promote the specific needs and interests of victims, with the exception of when they appear in the proceedings as witnesses. This means, *inter alia*, that, in the predominant criminal justice model, victims cannot initiate criminal proceedings, as the decision to open a case rests with a public authority, nor do they have a right to participate in criminal trials or to claim compensation for the loss suffered. Victims, it has been argued, 'in many ways... have been the silent partners in the legal process'.⁶

The exclusion of victims from most criminal justice models can be mainly attributed to the predominant paradigm of criminal justice, namely *retribution*, the primary goal of which is the prosecution and punishment of wrongdoers.⁷ The rationale underlying such an approach is based on the idea that punishing those who break the law restores and promotes the rule of law as well as satisfies society's needs for retribution. According to some commentators, the retributive rationale is not completely 'anti-victim'. In their view, retributive justice can 'annul or counter the appearance of the wrongdoer's superiority and thus affirm the victim's real value'.⁸ In this way, the punishment of individuals who break the law is thought to provide victims with some sense of satisfaction.

However, it must be acknowledged that the retributive model only accommodates victims' needs and interests to a limited extent. Retributive justice emphasises impartiality. This means, in effect, as Cragg has argued 'that the victim loses his central role in the drama whose focus is the wrong committed and not the person wronged'.⁹ Furthermore, since criminal justice systems mainly focus on ascertaining the criminal responsibility of wrongdoers victims are generally assigned, at best, a supporting role.

As such, the consequences of such a focus on the accountability of offenders are twofold: on the one hand, the need to assign the control of the proceedings to a state authority

⁶ R.S. Clark and D. Tolbert, 'Towards an International Criminal Court', in Y. Danieli and E. Stamatopoulou (eds) *The Universal Declaration of Human Rights: Fifty Years and Beyond* (Amytville: Baywood, 1999) 99-113 at 110.

⁷ A. McDonald, 'The Development of a Victim-Centered Approach to International Criminal Justice for Serious Violations of International Humanitarian Law', in J. Carey, W.V. Dunlap, R.J. Pritchard (eds), *International Humanitarian Law: Prospects* (Ardsley: Transnational Publishers, 2006) 237-276, at 242-243.

⁸ G.P. Fletcher, *With Justice for Some: Victims' Rights in Criminal Trials* (Reading: Addison-Wesley Publishing Company, 1995), at 203.

⁹ W. Cragg, *The Practice of Punishment: Towards a Theory of Restorative Justice* (London: Routledge, 1992), at 19.

with the power to defend the public's interest (such as a public prosecutor) and, on the other hand, the need to protect the rights of the accused persons.¹⁰ Both these needs, together with the idea that justice should be impartial and not constitute a form of legalised vengeance, have lead to the progressive exclusion of victims and their subjective experiences from criminal proceedings.

As the following sections will analyse, despite the prevailing view on the nature and purpose of criminal trials, the position of the victim in criminal justice systems has been progressively ameliorated in the last few decades. In order to better appreciate these changes, it is helpful to analyse the traditional position of victims in criminal proceedings within the two main procedural systems, the adversarial and the inquisitorial, and the main arguments in favour and against victims' participation in criminal trials.

2.1 The Role and Rights of Victims in Criminal Proceedings

The position of the victim varies significantly between national criminal justice owing largely to the legal tradition that has influenced their development. This study will focus on the common law and the civil law traditions since these traditions have been the main influence on the domestic criminal procedural models in the international community (as well as on the norms governing the functioning of international criminal tribunals as will be discussed in Chapter VI). Traditionally, comparativists have viewed criminal procedural models as characterised by a fundamental dichotomy between civil law procedure as inquisitorial, and common law procedure as adversarial.¹¹

In the various systems of different states, domestic criminal procedures have never been as clear as the presentation of these archetypes would suggest – a point emphasised by Damaška many years ago.¹² Nonetheless, for the purposes of this section, I shall refer to the main characteristics of the common law and the civil law traditions in relation to victims' rights, emphasising the major differences between them, while a more detailed analysis of selected national systems will be offered in the next sections of this Chapter.

¹⁰ M. Heikkilä, *International Criminal Tribunals and Victims of Crime: A Study of the Status of Victims before International Criminal Tribunals and of Factors affecting this Status* (Turku, Åbo: Institute for Human Rights, Åbo Akademi University, 2004), at 28.

¹¹ See e.g., P.J. van Koppen and S.F. Penrod, 'Adversarial or Inquisitorial: Comparing Systems', in *Id.* (eds), *Adversarial Versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems* (New York: Springer, 2003), 1-19.

¹² M. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven: Yale University Press, 1986). See C.M. Bradley, *Criminal Procedure: A Worldwide Study*, 2d ed. (Durham: Carolina Academic Press, 2007), at xvii, xvii- xxvii (introducing the division in criminal law between the common and civil law world).

2.1.1 *The Common Law Tradition and Victims*

The Anglo-American criminal justice system is said to be ‘adversarial’ in nature. The focal point of the adversarial model is the confrontation between the public prosecutor and the accused before an impartial judge.¹³ Such a contest, as will be discussed further in this Chapter, inherently excludes the rights and interests of victims. The contemporary structure of the common law criminal justice system reflects its historical origins which traditionally separated the functions of criminal law and tort law, the former dealing with public wrongs (crimes) and the latter with private wrongs.¹⁴ Accordingly, the criminal law and its penal sanctions are widely conceptualised as aiming to promote the public interest in denouncing and punishing unacceptable behaviour rather than furthering the interests of private parties.¹⁵

The common law system’s conception of the criminal process as a means of punishing conduct harmful to society requires the prosecutor to consider the public interest of initiating a criminal prosecution. Whilst victims of course form part of this collective interest, it has long been considered that the subjective interests of victims should not enter into the equation as they risk negatively influencing the objectivity of the trial.¹⁶ Therefore, although many victims may feel that they are owed a right to make their voice heard in relation to the issues of prosecution, reparation and sentencing, the common law criminal justice system places such rights or interests in a subordinate position to the collective interests of society in prosecuting the crime and punishing the perpetrator.

Furthermore, the traditional common law position is that in a trial strictly based on the contest between two actors, namely the prosecution and the defence, the addition of a third

¹³ M. Damaška, *The Faces of Justice and State Authority*, *supra* note no. 12, at 3; M.H. Freedman, ‘Our Constitutionalized Adversary System’, 1 *Chapman Law Review* (1998) 57-90, at 57; A. Orie, ‘Accusatorial v. Inquisitorial in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings before the ICC’, in A. Cassese, P. Gaeta, and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 2 (Oxford: Oxford University Press, 2002) 1439-1495.

¹⁴ See J. Doak, *Victims’ Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Oxford: Hart Publishing, 2008), at 2.

¹⁵ *Ibid.*, at 5-7. Ashworth describes the objective of criminal law as ‘to penalise those forms of wrongdoing which ... touch public rather than merely private interests.’ A. Ashworth, ‘What Victims of Crime Deserve’, paper presented to the Fulbright Commission on Penal Theory and Penal Practice, September 1992, cited in M. Cavadino and J. Dignan, ‘Reparation, Retribution and Rights’, 4 *International Review of Victimology* (1997) 233-253, at 237.

¹⁶ A. Ashworth and M. Redmayne, *The Criminal Process*, 3rd ed. (Oxford: Oxford University Press, 2005), at 50.

‘party’ would risk disrupting the balance of the criminal process, considerably delaying proceedings, and ultimately jeopardising the right of the accused to a fair trial.¹⁷

The exclusion of private interests from the criminal process is reflected in the rights afforded to victims and their role in the criminal process. Generally the victim’s role is limited to serving as a witness in trial. This in turn means that the victim’s role is very much dependent on the strategy of the prosecution and the defence – their concerns being taken into consideration only if parties decide to do so. In this respect, it has been observed that victims have no role to play in adversarial criminal systems other than to act as ‘evidentiary cannon fodder’.¹⁸ In order to address this criticism, some common law jurisdictions allow victims to provide an impact statement to the court at the sentencing stage of the proceedings.¹⁹ This statement documents any pain and suffering endured following the commission of the crime and may assist the judge in deciding on a fitting sentence.

Traditionally, under the common law system victims could not generally claim reparation through criminal proceedings. Rather, in order to obtain an award for reparations against the perpetrator, victims have to initiate entirely separate civil proceedings, thereby exposing themselves to potential liability for legal costs. Today, however, certain common law criminal courts provide victims with some compensation through so-called ‘restitution orders’, in which the offenders are required to pay victims for the losses they have suffered as a result of the offense.²⁰

2.1.2 The Civil Law Tradition and Victims

Civil law jurisdictions have traditionally preferred an inquisitorial criminal procedure with the judge at the heart of the procedure. In the inquisitorial process the judge is expected to play a central and active part in the establishment of the truth which is the central goal of such

¹⁷ See e.g. D.E. Beloof, ‘The Third Model of Criminal Process: The Victim Participation Model’ *Utah Law Review* (2000) 289-330, arguing that the introduction of victim’s rights in criminal proceedings requires a ‘third model’ that does not fit with the existing adversarial model.

¹⁸ J. Doak, *Victims’ Rights, Human Rights and Criminal Justice*, *supra* note no. 14, at 35, citing J. Braithwaite and K. Daly, ‘Masculinities, Violence, and Communitarian Control’, in S.L. Miller (ed), *Crime Control and Women: Feminist Implications of Criminal Justice Policy* (Newbury Park: Sage, 1998).

¹⁹ See generally, R.B. Schlesinger, U. Mattei, T. Ruskola and A. Gidi, *Schlesinger’s Comparative Law: Cases, Text, Materials*, 7th ed. (Brooklyn: Foundation Press, 2009) 858-62; B. McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Cambridge: Intersentia, 2011), at 84-86.

²⁰ M.E.I. Brien and E.H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems* (Nijmegen: Wolf Legal Productions, 2000), at 1072-1075.

process.²¹ Unlike the common law process, the trial is not based on a competition between the parties but is based rather on continued investigation as directed by the judge.²²

Despite traditionally adopting an inquisitorial approach to the judicial process, civil law jurisdictions are taking an increasingly adversarial approach in many cases.²³ Civil law adversarial trials are not, however, characterised by the idea that the process should be a duel between the prosecutor and the defence only. Rather, they are intimately related to the idea that all sides need to be heard in the process so that the court is able to reach an accurate judgment. Accordingly, the civil law system's focus on uncovering the truth allows—if not prioritises—victims' interventions in the proceedings.²⁴

As such, civil law systems generally allow victims to play a much more active role in proceedings, accommodating their counsel as an independent party who plays the role of protecting the victim's interests in the course of proceedings while at the same time pursuing a reparative claim. This model is commonly referred to as the 'adhesion' or '*partie civile*' procedure. This procedure is widely utilised in France and Belgium and confers three important rights upon victims of crime.²⁵ First, as we will see further in this chapter, victims can use the procedure to initiate prosecution of an alleged offender. Second, victims are entitled to participate in their own right and to be heard as a party in the criminal trial. Participating in this way ensures that the victim is a fully-fledged contributor to the proceedings, on equal footing with both the prosecution and the defence. As a civil party to the action, the victim is endowed with important procedural rights including the rights to be regularly informed of the progress of the case, to challenge decisions taken during the process that threaten the victim's interests, to make additional observations and to be heard as a plaintiff (without oath, differently from witnesses) regarding the injury suffered. Finally, through this procedure, victims have a right to pursue a claim for civil damages in the criminal action.

²¹ M. Heikkilä, *International Criminal Tribunals and Victims of Crime*, *supra* note no. 10, at 51; P.L. Reichel, *Comparative Criminal Justice Systems: A Topical Approach*, 3rd ed. (Upper Saddle River: Prentice Hall, 2002), at 133.

²² M. Damaška, *The Faces of Justice and State Authority*, *supra* note no. 12, at 3.

²³ M. Chiavario, 'Private Parties: The Rights of the Defendant and the Victim', *supra* note no. 4, at 548. See e.g., in relation to Italy, M. Caianiello, 'The Italian Public Prosecutor: An Inquisitorial Figure in Adversarial Proceedings?', in E. Luna and M. Wade (eds), *The Prosecutor in Transnational Perspective* (Oxford: Oxford University Press, 2012), available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1976204 (last visited on 24 June 2013).

²⁴ B. McGonigle Leyh, *Procedural Justice?*, *supra* note no. 19, at 71-74.

²⁵ M. Chiavario, 'Private Parties: The Rights of the Defendant and the Victim', *supra* note no. 4, at 542-547; V. Dervieux, 'The French System', in M. Delmas-Marty and J. R. Spencer (eds), *European Criminal Procedures*, *supra* note no. 4, 218-291, at 226-227.

Some inquisitorial jurisdictions also permit the victim to assist the prosecutor as a subsidiary prosecutor. For instance, Germany, Austria, Malta, Norway, Sweden and various eastern European countries operate some form of subsidiary prosecutor scheme which allow victims an active role in both the pre-trial decision-making process and the trial itself.²⁶ The procedure generally allows victims to submit evidence, comment on representations made by the prosecution and the defence and express their opinions on key decisions taken. In this sense, the victim's lawyer can be an important ally of the public prosecutor, who nonetheless retains the burden of arguing the prosecution's case.

All in all, the rights attributed to victims in the civil and the common law procedural models reflect the various goals of the criminal process within those two systems. On the one hand, common law criminal procedures focus primarily on the 'duel' between the prosecution and the defence based on strict procedural rules aimed at ensuring the fairness of the trial; on the other, civil law criminal procedures primarily aim at the establishment of the truth, and as such the involvement of victims not only seems opportune but in fact necessary to obtain a broader picture of the crimes at issue.

Despite the traditional differences between these two models, in relation to the recognition of victims' rights to participate in the criminal process at least, the gap between the two models has been narrowing.

The rise of the victims' rights movement in the 1960s produced significant changes within common law systems, making them more sensitive to victims' concerns. This movement for the first time recognised that victims have a compelling interest in the trial process and that his or her participation at trial ought to be guaranteed.²⁷ At the same time, the emergence of international legal standards on the rights of victims, as will be illustrated in sections 3 and 4 of this Chapter, has influenced the adoption of legislative amendments at the domestic level incorporating victims' interests and rights in relation to criminal proceedings.

2.2 Victims' Rights in Criminal Proceedings: Arguments in Favour and Against

There is a vast amount of literature debating the arguments in favour or against victims' participation in criminal proceedings.²⁸ Whilst consideration of the effects of victims'

²⁶ B. McGonigle Leyh, *Procedural Justice?*, *supra* note no. 19, at 81-84; C. Safferling, 'The Role of the Victim in the Criminal Process – A Paradigm Shift in National German and International Law?', 11 *International Criminal Law Review* (2011) 191-194; M.E.I. Brien and E.H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems*, *supra* note no. 20, at 363-364.

²⁷ C.M. Bradley, *Criminal Procedure*, *supra* note no. 12, at xxi.

²⁸ See *infra* notes nos. 29-39.

participation on the criminal process itself are certainly relevant, it is also necessary to analyse both legal and non-legal arguments in order to assess whether victims actually want specific participatory rights.

The arguments in favour of victims' participation focus on two main elements, namely: (i) the beneficial effects on victims' suffering; and (ii) the enhancement of the legitimacy of the criminal system.

In relation to the beneficial effects on victims' suffering, it has been long argued that victims' involvement in proceedings would do more harm than good for survivors, due to the danger that participation may reopen 'healed wounds' that would be best forgotten.²⁹ However, recent studies (especially in the context of gross violations of human rights) tend to confirm that even if victims do not actually seek decision-making power, they do seem to desire recognition, acknowledgment and some form of participation in the criminal process.³⁰ A range of empirical studies suggest that victim participation in the criminal justice process enhances satisfaction with the justice system by giving victims a sense of empowerment and official, albeit symbolic, acknowledgment.³¹ Indeed, as argued in Chapter III, if trials symbolise society's acknowledgment and condemnation of what survivors suffered, those who participate as complainants or plaintiffs may feel their suffering recognised in some way. From a moral standpoint, it has been suggested that it is only right that victims have an

²⁹ A. Boraine, 'Introduction', in *Id.*, J. Levy, R. Scheffer and D.M. Tutu (eds) *Dealing with the Past: Truth and Reconciliation in South Africa*, 2nd ed. (Pretoria: Idasa Publications, 1997), at xiv, stating: 'The focus on past violations runs the risk of being counterproductive and, instead of healing, can actually cause fresh wounds and cleavages in an already deeply divided society'. But see *contra* J. Méndez, 'Comments on Prosecution: Who and For What?', *Ibid.*, 87-93, at 90, arguing that 'prosecution in itself will provide a measure of healing and show the victims that their plight has not been forgotten by the states and society'. See also D. Kaminer et al., 'The Truth and Reconciliation Commission in South Africa: Relation to Psychiatric Status and Forgiveness Among Survivors of Human Rights Abuses', 178 *The British Journal of Psychiatry* (2001) 373-377, at 375 ('If justice is done, and seen to be done, psychological healing may be facilitated'); N. J. Kritz, 'Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights', 59 *Law and Contemporary Problems* (1996) 127-152, at 129 ('[T]otal impunity, in the form of comprehensive amnesties or the absence of any accountability for past atrocities, is immoral, injurious to victims, and in violation of international legal norms.');

Human Rights Watch, *Leave None to Tell the Story: Genocide in Rwanda* (1999) ('Without justice, there is no relief-psychological and material-for the victims and there is no hope of reconciliation for the society.')

³⁰ E. Kiza, C. Rathgeber, H-C. Rohne, *Victims of War: An Empirical Study on War-Victimization and Victims' Attitudes towards Addressing Atrocities* (Hamburg: Hamburger Edition, 2006), at 102-106; J. Doak, 'Victims and the Sentencing Process: Developing Participatory Rights?', 29 *Legal Studies* (2009) 651-677, at 652-653; J. Wemmers and K. Cyr 'Victims' Perspectives on Restorative Justice: How Much Involvement Are Victims Looking for?', 11 *International Review of Victimology* (2004) 1-16.

³¹ See e.g. H. Kury and M. Kaiser, 'The Victim's Position within the Criminal Proceedings – An Empirical Study', in G. Kaiser, H. Kury and H.-J. Albrecht (eds) *Victims and Criminal Justice: Legal Protection, Restitution and Support* (Freiburg: Max Planck Institute, 1991); J. O'Connell, 'Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?', 46 *Harvard International Law Journal* (2005) 295-345, at 328-330.

opportunity to play a role in the criminal proceedings since this can provide some measure of reassurance to them that they have public recognition and support.³²

Of course, one may object that participating as a witness may have the same beneficial effects and that, accordingly, there is no need for victims to act as parties to the proceedings to receive acknowledgment of their sufferings from the state. Evidence would, in principle, seem to confirm such objections. For instance, Stover reports that for many of the ICTY witnesses he interviewed ‘merely being in the courtroom with the accused while he was under guard helped to restore their confidence in the order of things.’³³

However, evidence also supports the view that a significant proportion of the victims who testify at trials suffer psychological distress. O’Connell has rightly observed that ‘legal proceedings are not designed to help survivors cope: they aim to determine legal liability that could impose serious penalties.’³⁴ A number of aspects of testifying in a criminal court can cause victims’ suffering. This process, also known as ‘secondary victimization’³⁵ includes the process of recalling the trauma, ordering memories coherently, and having to stick to the facts of the case which could frustrate victims who have waited years to tell their story publicly. Dembour and Haslam, in their study of the transcripts of victim-witnesses who testified in the trial of Radislav Krstić, dispute ‘the claim that victim-witnesses benefit from participating in war crimes trials’.³⁶ While focusing only on the Krstić case, they contend that ‘any other ICTY case would illustrate our thesis that the international criminal justice process instrumentalises individual memory for its own collective ends with unsuspected (or at least unexplored) costs for the individuals and possibly collectivities concerned.’³⁷

It is submitted that secondary victimisation may be more common in legal systems that adopt an adversarial, party-driven process, rather than in civil law systems where judges rather than parties control the fact-finding process and the questioning of witnesses.³⁸ Indeed, lacking an interest in proving one side of the case, civil law judges may be less likely that

³² J. Doak, ‘Victims and the Sentencing Process: Developing Participatory Rights?’, *supra* note no. 30, at 653; M. Cavadino and J. Dignan ‘Reparation, Retribution and Rights’, *supra* note no. 15, at 235-236.

³³ E. Stover, *The Witness: War Crimes and the Promise of Justice in The Hague* (Philadelphia: University of Pennsylvania Press, 2005), at 118-119.

³⁴ *Ibid.*, at 331.

³⁵ Secondary victimization refers to the victimization which occurs through the response of institutions and individuals to the victim. See U. Orth, ‘Secondary Victimization of Crime Victims by Criminal Proceedings’, 15 *Social Justice Research* (2002) 313-325.

³⁶ M.-B. Dembour and E. Haslam, ‘Silencing Hearings? Victim-Witnesses at War Crimes Trials’, 15 *European Journal of International Law* (2004) 151-177, at 154.

³⁷ *Ibid.*

³⁸ A. Cassese, ‘Reflections on International Criminal Justice’, 60 *Modern Law Review* (1998) 1-10, at 10.

common law defence lawyers to treat testifying victims in an antagonistic manner.³⁹ It remains the case, however, that whatever the criminal system in place, victims' participation as witnesses only grants limited recognition to victims' interests and concerns. As such, the restorative power of such participation, in other words the cathartic/psychological benefit victims receive from such participation, remains doubtful, in contrast to the recognition of participatory rights to victims that would enable them to participate on their own right.

Calls for enhanced participatory rights for victims have also relied on the argument that more meaningful participation contributes to overall levels of victim satisfaction and thereby bolsters the legitimacy of the criminal justice system as a whole.⁴⁰ This may be particularly important in post-conflict situations where mass atrocities have occurred and there is a need to rebuild trust in state institutions and the rule of law.

As observed above, victims' participation is excluded from certain systems because it is feared that the introduction of private interests may disrupt the objectivity of the criminal process. In particular, opponents of victims' participation in criminal proceedings point out that it may jeopardise the prioritisation of public interests and the accused's right to a fair trial. Such arguments are often grounded in the assumption that victims are in some way motivated by vengeance and will accordingly pursue this motive in seeking to secure a harsh sentence for the accused.⁴¹ In this sense, it is feared that victim participation could introduce a new and unpredictable variable into the penalty equation, jeopardising core principles such as objectivity and proportionality.

It is certainly true that any legitimate criminal justice system should ensure that its decisions are rooted in consistency and objectivity. As such, offering the victim some form of 'veto' in pre-trial decision-making would endanger both the public interest in punishing the crime and the accused's right to be treated in a fair and consistent manner. However, as stated above, victim participation can also ensure that courts have a fuller picture of the crime and consequently that they are better placed to issue a correct sentence to the offender and order reparation to the victims.

Moreover, the arguments against victim participation tend to exaggerate the extent to which the consequences of such participation are likely to be unforeseen. Judges are, after all, trained to disregard evidence that is irrelevant. The interests of the victims are but one factor

³⁹ J. O'Connell, 'Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?', *supra* note no. 31, at 334.

⁴⁰ J. Doak, 'Victims and the Sentencing Process: Developing Participatory Rights?', *supra* note no. 30, at 653.

⁴¹ As Erez et al. acknowledged, some commentators fear a 'reversion to the retributive, repressive and vengeful punishment of an earlier age'. E. Erez, L. Roeger and F. Morgan 'Victim Harm, Impact Statements and Victim Satisfaction with Justice: An Australian Experience', 5 *International Review of Victimology* (1997) 37-60, at 40.

that ought to be taken into account alongside a range of other factors, including the seriousness of the offence, the threat posed to the public and any mitigating circumstances.⁴²

As this Chapter will discuss, whilst there are a variety of structural and normative reasons why victims have traditionally been unable to participate in common law criminal justice systems, recent years have witnessed a major shift in attitude regarding the merits of victim participation at both the domestic and international level.

⁴² See J. Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties*, *supra* note no. 14, at 151-156.

3 INTERNATIONAL LEGAL FRAMEWORK ON VICTIMS' PARTICIPATION IN CRIMINAL PROCEEDINGS

As mentioned in the introduction to this Chapter, throughout the last three decades a number of documents have been adopted at the international and regional level acknowledging the importance of considering victims' concerns in the criminal process. Starting with the *UN Basic Principles of Justice for Victims of Crime and Abuse of Power* in 1985,⁴³ and the Council of Europe Recommendation in the same year,⁴⁴ international legal norms began to recognise that victims need to be treated with compassion, dignity and that they are entitled to redress for their suffering in terms of access to justice and reparation. Through a thorough analysis of the law and practice of international human rights law, this section poses the following question: should criminal tribunals provide victims with certain rights and entitlements? And if so, what should they cover?

3.1 Global Instruments

As noted in the introduction to this Chapter, the matter of victims' participation in criminal proceedings before domestic courts has been traditionally left to the discretion of states because of the substantially different approaches that these states have taken to this subject. Accordingly, only a small number of international conventions explicitly refer to a right of the victim to participate in criminal proceedings. As will be discussed in Section 4, human rights supervisory bodies have derived victims' rights from other rights, including the right to an effective remedy. In recent years, however, a number of non-conventional documents have been adopted by the United Nations in relation to the rights of victims.

3.1.1 International Conventions

As mentioned above, only a limited number of international conventions deal with the rights of victims of human rights violations in criminal proceedings. In particular, mention should be made of the *International Convention for the Protection of All Persons from Enforced Disappearance*, the *Convention against Transnational Organized Crime* and the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*.

⁴³ See *supra* note no. 2.

⁴⁴ See *supra* note no. 3.

The *Convention on Enforced Disappearance* sets out the right of victims to report any instance of enforced disappearance and to be informed of ‘the progress and results of the investigation’.⁴⁵ Article 25(3) of the *Convention against Transnational Organized Crime* establishes that ‘each State Party shall, subject to its domestic law, enable views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings.’ Using similar wording, Article 6 of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons* requires that victims are ‘assisted to express their views and concerns at appropriate stages of criminal proceedings in a manner not prejudicial to the rights of the defense.’

As will be discussed in Chapter VI, victims’ participation in criminal proceedings has also been recognised in the context of international criminal trials in the Rome Statute for the International Criminal Court (‘ICC’), an international treaty ratified by the vast majority of the states of the international community.⁴⁶

3.1.2 *Non-Binding Legal Instruments*

In recent year, a large number of documents of non-binding nature prescribing victims’ participatory rights in criminal proceedings have been adopted. These include general recommendations by UN treaty bodies, resolutions and declarations adopted by the General Assembly. As far as general recommendations by UN treaty bodies are concerned, reference can made, for instance, to *General Recommendation No. 19 on the Violence against Women* adopted by the Committee on the Elimination of Discrimination against Women (‘CEDAW Committee’) in 1992 whereby the Committee encouraged states to provide victims ‘effective complaints procedures and remedies’.⁴⁷

General Recommendation No. XXXI on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System, adopted by the Committee on the Elimination of Racial Discrimination (‘CERD Committee’) in 2005, goes even further by detailing the rights that victims should be granted in the course of criminal proceedings. Referring to Article 6 of the *International Convention on the Elimination of Racial Discrimination*, on victims’ right to an effective remedy, the Committee invites states to:

⁴⁵ International Convention for the Protection of All Persons from Enforced Disappearance, Arts. 12 and 24(2).

⁴⁶ As of June 2013, the ICC Statute has been ratified by 122 states.

⁴⁷ CEDAW Committee, *General Recommendation No. 19 on the Violence against Women*, 1992, UN Doc. A/47/38 at 1 (1993), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.6 at 243 (2003), § 24(i).

Grant[...] a proper place to victims and their families, as well as witnesses, throughout the proceedings, by enabling complainants to be heard by the judges during the examination proceedings and the court hearing, to have access to information, to confront hostile witnesses, to challenge evidence and to be informed of the progress of proceedings.⁴⁸

Mention can also be made of the *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted by the General Assembly in 2000, which establish that victims have right both to be informed and to have access to any hearing or relevant information about the investigation, including the right to present additional evidence (Article 4).⁴⁹ In a similar vein, Paragraph 8 of the UN Resolution on Children as Victims and Perpetrators of Crime holds that states:

[I]n a manner consistent with the procedural rules of national law and the administration of justice ... should enable children to participate as appropriate, in criminal justice proceedings, including the investigative stage and throughout the trial and post-trial process period, to be heard and given information about their status and any proceedings that might subsequently take place.⁵⁰

A number of instruments have also been adopted specifically dealing with the rights of victims of human rights violations. Although not legally binding, these instruments have profoundly influenced the emergence of international standards on this matter. Particular mention should be made to the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* of 1985, the *Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* of 2005, and the *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* of 2005.

A. THE 1985 DECLARATION FOR VICTIMS OF CRIME

The 1985 Declaration for Victims of Crime, also referred to as the ‘Magna Carta for Victims’⁵¹, marked an important step in introducing a new awareness of the need for justice for victims. The Declaration, partly based on Article 8 of the Universal Declaration of Human

⁴⁸ CERD Committee, *General Recommendation No. XXXI on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System*, 2005, UN Doc. A/60/18, at § 19(a).

⁴⁹ UN GA, *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, UN Doc. A/RES/55/89, 4 December 2000.

⁵⁰ *Resolution on Children as Victims and Perpetrators*, adopted by the Ninth UN Congress on the Prevention of Crime and the Treatment of Offenders, UN Doc. A/CONF.169/16 (1995), 12 May 1995, § 8.

⁵¹ See *supra* note no. 2. Y. Danieli, ‘Reappraising the Nuremberg Trials and Their Legacy: The Role of Victims in International Law’, 27 *Cardozo Law Review* (2006) 1633-1649, at 1645.

Rights⁵², is the first international instrument that provides for the right of victims to have access to justice and receive reparation for the injuries suffered.⁵³ A review of the *travaux préparatoires* of the Declaration evidences how, although the drafters generally agreed on its contents, divergences remained as to the scope of the document itself. Particularly, the ‘question of to what extent the complainant should be allowed to express his views and concerns in the criminal justice process caused considerable debate in the drafting of the United Nations Declaration’ and remained very much controversial until the very end.⁵⁴ After much discussion, this Declaration provides, in Article 4, that victims ‘are entitled to access to the mechanisms of justice and prompt redress, as provided for by the national legislation’. Moreover, the Declaration includes a provision specifically dealing with victim participation, Article 6(b), found under the heading ‘Access to Justice and Fair Treatment’, which reads as follows:

The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.

The language of this provision does not explicitly set out participatory rights for victims, but rather limits itself to recommending that states allow for some inclusion of victims in the criminal process. In view of what we observed above in relation to the drafting process, the vague and non-prescriptive language of this article may be explained with the necessity to safeguard states’ discretion in adjusting their own criminal systems to the Declaration. The fact that the Declaration was eventually adopted by consensus reflects, however, a widespread opinion, among different national jurisdictions, that victims should be entitled to play some role in the criminal process.⁵⁵

This view has been confirmed by two factual elements following the adoption of the Declaration. First, publications elaborating best practices on how states can implement the Declaration have interpreted it as providing for victims’ participation early in the criminal process. For example, the *Handbook on Justice for Victims* interprets the Declaration as

⁵² UN GA, *Universal Declaration of Human Rights*, GA Res. 217A (III) (UN Doc. A/810 at 71), 10 December 1948.

⁵³ Some scholars, however, have argued that the standards proclaimed in the 1985 UN Declaration are based on ‘well-established precedents’; e.g., L. L. Lamborn, ‘The United Nations Declaration on Victims: The Scope of Coverage’, in M.C. Bassiouni (ed.), *International Protection of Victims* (Èrès: Association Internationale de Droit Pénale, 1988) 105-126, at 105.

⁵⁴ M. Joutsen, *The Role of the Victim of Crime in European Criminal Justice Systems: A Cross National Study of the Role of the Victim* (Helsinki: Helsinki Institute for Crime Prevention and Control, 1987), at 179.

⁵⁵ *Ibid.*, at 66.

requiring states to provide for some sort of review mechanism for challenging decisions not to prosecute.⁵⁶ Accordingly, the Declaration has also been interpreted as providing for victims' right to influence the prosecutorial decision-making process throughout the proceedings; in particular, many states have put in force procedures whereby victims can seek a review of decisions that adversely affect their interests concerning investigation, identification and prosecution.⁵⁷

Furthermore, although the Declaration as such is not legally binding, during the negotiations of the Rome Statute of the International Criminal Court it was considered as a reference text for the issue of victim participation, by virtue of its adoption by consensus and the wide acceptance of its provisions.⁵⁸ As will be discussed in Chapter VI, the provisions of the ICC Statute establishing a victim's participation scheme are largely formulated along the lines of the 1985 Declaration. From this perspective, the Declaration has paved the way to the setting of international standards on victims' rights in criminal proceedings before domestic and international courts.

B. BASIC PRINCIPLES AND GUIDELINES ON THE RIGHT TO A REMEDY AND REPARATION FOR VICTIMS OF GROSS VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

The 1985 Declaration was followed in the 1990s by a raft of academic literature and studies on the rights of victims of crime, such as the study on the right to reparation for victims of human rights entrusted to Van Boven by the UN Sub-Commission on the Promotion and Protection of Human Rights.⁵⁹ This study culminated with the drafting of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights Law and Humanitarian Law which represent one of the most notable attempts to codify rules and principles on the enforcement of human rights protection

⁵⁶ United Nations Office for Drug Control and Crime Prevention, *Handbook on Justice for Victims: On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (New York: UNODCCP, 1999), at 39.

⁵⁷ *Ibid.*

⁵⁸ This happened as a response to the request contained in ECOSOC Resolution 1996/14, *Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN Doc. E/CN.15/1996/16/Add.15, 23 July 1996, at § 6, which recommended the incorporation of the 1985 Declaration in the ICC Statute. See also United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of Working Group on Procedural Matters, UN Doc. A/CONF.183/C.1/WGPM/L.2/Add.8, 16 July 1998, at 7.

⁵⁹ Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final report submitted by Mr. Theo van Boven*, UN Doc. E/CN.4/Sub.2/1993/8, 2 July 1993, 2 July 1993.

from the perspective of the victim. The work by Van Boven was then continued and finalised by Bassiouni, who submitted a revised version of the Principles, incorporating the criminal dimension of remedies for gross violations. The Principles were concluded and adopted by the GA in December 2005.⁶⁰

Despite not specifically calling for victim participation, the Basic Principles focus on three overarching rights, considered to be integral components of victims' right to remedy, that can be interpreted as implying a victim's right to participation in the criminal process.⁶¹ These are: (i) the right to equal and effective access to justice (Principle VIII); (ii) the right to adequate, effective and prompt reparation for the harm suffered (Principle IX); and (iii) the right of access to the relevant information concerning the violations and reparation mechanisms (Principle X).

Indeed, as pointed out by Theo Van Boven in an earlier study of the Basic Principles:

[G]ross violations of human rights are by their very nature irreparable and any remedy would fail to repair the grave injury inflicted to the victims, especially when the violations have been committed on a massive scale. Remedies must thus focus on the restoration of rights and the accountability of wrongdoers'.⁶²

As observed in Chapter III, the view has emerged that reparation for victims of gross violations of human rights entails an obligation of the state to investigate, prosecute and punish those responsible for the violations. This view is also confirmed by Principle 22 (f) of the Basic Principles, which provides that satisfaction of victims includes 'judicial and administrative sanctions against persons liable for the violations'.

Accordingly, it can be argued that if prosecution of perpetrators is understood as a form of reparation which victims have a right to, victims should be able to claim such a right, by being entitled to exercise certain rights in criminal proceedings. Victims' right to have access to information about the violations, or right to truth, is also interconnected with the right of victims to be heard in the criminal process.

Various modalities can be used to safeguard and implement the right to truth. It is remarkable that the Office of the High Commissioner of Human Rights has stressed the role played by criminal proceedings in ensuring the right to truth as well as the role played by

⁶⁰ UN GA, *Basic Principles and Guidelines on the Right to Restitution, Compensation and Rehabilitation, for Victims of Gross Violations of Human Rights and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, 16 December 2005; D. Shelton, 'United Nations Principles and Guidelines on Reparations: Context and Contents', in K. de Feyter, S. Parmentier, M. Bossuyt, and P. Lemmens (eds), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Antwerpen: Intersentia & Institute for Human Rights, 2006) 11-33, at 14 ff.

⁶¹ B. McGonigle Leyh, *Procedural Justice?*, *supra* note no. 19, at 100-104.

⁶² *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, *supra* note no. 59, at 53.

victims in that context.⁶³ Victims, having first-hand knowledge of the facts surrounding the violations, may provide an important contribution to the establishment of the truth. Accordingly, the recognition of victims' right to truth may well be read as implying their right to be heard in the criminal process.⁶⁴

In sum, the right to access to justice, the right to reparation and the right to truth, set out in the Basic Principles as integral components of victim's right to remedy, are all associated with the recognition of victim's rights in criminal proceedings. Although the Basic Principles do not explicitly call for victim participatory rights in judicial processes they implicitly support the notion of victims having some form of participation in criminal justice processes in order to ensure the respect of their right to remedy.

C. THE SET OF PRINCIPLES FOR THE PROTECTION AND PROMOTION OF HUMAN RIGHTS THROUGH ACTION TO COMBAT IMPUNITY

In 2005, another instrument explicitly dealing with the rights of victims of human rights violations was adopted, namely the *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* ('Principles on Impunity'), first drafted by Louis Joinet and later updated by Diane Orentlicher, the then UN independent expert on this subject.⁶⁵ In contrast to the two UN Declarations examined above which use vague and non-prescriptive language, ultimately leaving to states the decision on how victims' concerns should be incorporated in the criminal process, more specific terms are used in the *Principles on Impunity*.

In particular, Principle 19 of the *Principles on Impunity* links in an explicit manner victims' right to justice with the recognition of procedural rights in the criminal process, affirming that:

The right to justice entails obligations for the State: to investigate violations, to prosecute the perpetrators and, if their guilt is established, to punish them. Although the decision to prosecute is initially a State responsibility,

⁶³ UN Commission on Human Rights, *Study on the Right to the Truth, Report of the Office of the United Nations High Commissioner for Human Rights*, UN Doc. E/CN.4/2006/91, 8 February 2006, § 61; Commission on Human Rights, *Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, Diane Orentlicher; Addendum: *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, Principle 19; R. Aldana-Pindell, 'In Vindication of Justiciable Victims' Right to Truth and Justice for State-Sponsored Crimes', 35 (2002) *Vanderbilt Journal of Transnational Law* 1399-1501, at 1442.

⁶⁴ B. McGonigle Leyh, *Procedural Justice?*, *supra* note no. 19, at 98-104.

⁶⁵ See *supra* note no. 63; *Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)*, Revised Final Report Prepared by Mr. Joinet Pursuant to Sub-Commission Decision 1996/119, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997.

supplementary procedural rules should allow victims to be admitted as civil plaintiffs in criminal proceedings or, if the public authorities fail to do so, to institute proceedings themselves.

The language used in the *Principles on Impunity* differs from the documents analysed above in the sense that for the first time it establishes a clear link between the right to justice and the exercise of rights in the criminal process. Whereas earlier documents only referred to the need to hear victims' concerns, these Principles indicate that victims should be enabled to concretely enforce their right to justice, by having the ability to initiate a criminal prosecution, even when state authorities have not done so. As such, for the first time, recognition is given to the private interests of the victims, not only as an element that should be considered in the criminal process, but as one that may eventually have an impact on the decision-making process.

Despite the fact that the *Principles on Impunity* are not binding on states, they have already had a profound impact on efforts to combat impunity by becoming a key reference in decisions by the supervisory bodies for the American Convention on Human Rights⁶⁶ and other national authorities in support of measures to combat impunity.⁶⁷ Therefore, it can be asserted that these Principles make a genuine contribution to the emergence of international standards on the matter,⁶⁸ having an equally important impact upon the position of victims in criminal proceedings especially since, as we shall see in the following sections, similar provisions have been included in subsequent documents adopted at the regional level, as well as in the practice of human rights supervisory bodies.

3.2 Regional Instruments on Victims' Rights in Criminal Proceedings

In recent years, there has been a clear increase in the recognition of victims' rights at a regional level. Without aiming to be exhaustive, this section presents some of the most significant instruments adopted on this issue.

⁶⁶ See e.g. IACtHR, *Bámaca Velásquez v. Guatemala*, Order (Monitoring Compliance with Judgment), 18 November 2010, § 44

⁶⁷ In her introduction to the *Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening their Domestic Capacity to Combat All Aspects of Impunity*, Diane Orentlicher observed that since 1997 the Set of Principles 'have played an influential role in strengthening domestic efforts to combat impunity' and that '[d]uring the same period, the Principles as a whole have received strong affirmation in decisions by international criminal tribunals and human rights treaty bodies'. UN Doc. E/CN.4/2004/88, 27 February 2004, at 1.

⁶⁸ See Chapter I, Section 4.2.1.

3.2.1 Council of Europe

Since the early 1980s, the Council of Europe has integrated the victim's perspective in its work in the field of the fight against crime. This is all the more relevant since the European Court of Human Rights ('ECtHR') has acknowledged the 'need to safeguard victims' rights and their proper place in criminal proceedings'⁶⁹ and the need to protect vulnerable victims, as will be further illustrated in this Chapter.

In 1985 the Committee of Ministers issued Recommendation No. R(85)11 titled 'On the position of the victim in the framework of criminal law and procedure',⁷⁰ with a view of changing the traditional approach of criminal law which until that moment had focused on the relationship between the state and the offender and tended to ignore the interests of victims. The Recommendation invites states to take into account the needs of the victims 'to a greater degree throughout all stages of the criminal process'⁷¹ and includes guidelines aimed at protecting victims of crime and safeguarding their interests at each stage of the criminal procedure. No right to participation in the proceedings is provided as such, but the document emphasises the need to inform victims about the development of the case and, in particular, of the final decision concerning prosecution as well as of the final outcome of the case.⁷² Moreover, the Recommendation establishes that victims should have the right to seek review of a decision not to prosecute or the right to institute private proceedings.⁷³

Following Recommendation 85(11), the Council of Europe continued to emphasise the need to support victims' rights in criminal proceedings. In Recommendation 87(21),⁷⁴ the Committee of Ministers called for greater awareness of the need to inform and assist victims during the criminal process.⁷⁵ In a more recent recommendation on the role of the public prosecutor, the Committee recommended that victims be able to challenge the decision of public prosecutors not to prosecute, either by way of judicial review or by authorising parties to engage in private prosecutions.⁷⁶ In so doing, the Committee seems to uphold the emerging international standard according to which prosecution is a right that victims should be able to claim.

⁶⁹ ECtHR, *Perez v. France* (App. No. 47287/99), Judgment (Merits), 12 February 2004, § 72.

⁷⁰ *Recommendation No. R (85) 11*, *supra* note no. 3.

⁷¹ *Ibid.*, at 1.

⁷² *Ibid.*, at 2.

⁷³ *Ibid.*

⁷⁴ Council of Europe, Committee of Ministers, *Recommendation No. R (87) 21 of the Committee of Ministers to Member States on Assistance to Victims and the Prevention of Victimization*, 17 September 1987.

⁷⁵ *Ibid.*, at 2.

⁷⁶ Council of Europe, Committee of Ministers, *Recommendation R. (2000) 19 of the Committee of Ministers to Member States on the Role of Public Prosecution in the Criminal Justice System*, 6 October 2000, § 34.

More recently, in 2006, the Committee issued a detailed recommendation ‘on assistance to crime victims’.⁷⁷ The recommendation, in particular, sets forth a number of measures directing states to ‘respect the security, dignity, private and family life of victims and recognise the negative effects of crime on victims.’⁷⁸ Although not explicitly demanding specific participatory rights for victims in the criminal process, several provisions of the recommendation suggest that victims should be able to defend their interests during the criminal trial. For instance, Article 7(2) sets out that ‘States should institute procedures for victims to claim compensation from the offender in the context of criminal proceedings.’

3.2.2 *European Union*

The European Union has also contributed to strengthening the role afforded to victims in European criminal justice systems. Through a series of legislative measures, the European Union has attempted to introduce common European standards while respecting national sovereignty through the principles of proportionality and subsidiarity. The need for the harmonisation of victims’ rights, in particular, ensues from the concept of European citizenship which requires that citizens of the Union be guaranteed the same rights across the member states without discrimination on the basis of nationality.⁷⁹

The most significant EU legislative instrument concerning victims of crime is the Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, adopted by the Council of the European Union.⁸⁰ The decision, which is binding on all member states, urges states to ensure that victims ‘have a real and appropriate role’⁸¹ in their criminal legal system. Despite the notable differences in the criminal procedures of the various EU states, the document calls on member states to ‘recognize the rights and legitimate interests of victims with particular reference to criminal proceedings’⁸² and requires them to provide for the possibility of victims to be heard and to provide evidence. In addition,

⁷⁷ Council of Europe, Committee of Ministers, *Recommendation R. (2006) 8 of the Committee of Ministers to Member States on Assistance to Crime Victims*, 14 June 2006.

⁷⁸ *Ibid.*, § 2.1.

⁷⁹ P. Bárd, A. Borbíró, ‘Local and Regional Good Practices on Victims’ Rights’, Centre for European Policy Studies, 2011, at 2, available online at <http://cor.europa.eu/en/documentation/studies/Documents/local-regional-good-practices-victims.pdf> (last visited on 26 June 2013).

⁸⁰ Council of the European Union, *Council Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings* (2001/220/JHA), 15 March 2001. In *Pupino*, the European Court of Justice (‘ECJ’) held that even though the EU Framework decisions have no direct effect (pursuant to art. 34(2)(b) sentence 2 of the Maastricht Treaty), they may indirectly influence the criminal process since national courts are under an obligation to interpret criminal procedural law in conformity with them. ECJ, *Maria Pupino* C-105/03, 16 June 2005, European Court Reports 2005, page I-05285.

⁸¹ Council Framework Decision of 15 March 2001, *supra* note no. 80, Art. 2(1).

⁸² *Ibid.*

member states are asked to ensure that victims have access to all relevant information for the protection of their interests, including the outcome of their complaint and the court's sentence.⁸³

On 25 October 2012, the European Parliament and the Council of the European Union adopted a Directive 'setting minimum standards on the rights, support and protection of victims of crime', replacing the Framework Decision mentioned above.⁸⁴ The document establishes common minimum rules on the rights, support and protection of victims of crime. In particular, recognising that '[c]rime is a wrong against society as well as a violation of the individual rights of victims', the Directive asks states to ensure that victims are treated with respect and that their needs are taken into account.⁸⁵ In doing so, the Directive substantially subverts the traditional retributive rationale that has been adopted in most criminal justice systems, particularly common law systems, as observed above. Most importantly for the purposes of the present discussion the proposed Directive recommends that states provide victims with adequate support and information and ensure that they are involved in proceedings:

Justice cannot be effectively achieved unless the victim can properly explain the circumstances of the crime they have suffered and provide their evidence in a manner understandable to the competent authorities. It is equally important to ensure the respectful treatment of the victim and to ensure they are able to access their rights.⁸⁶

As explained by the Commission in a document circulated prepared during the drafting of the Directive:

Victims have a legitimate interest in seeing that justice is done. They should be given effective access to justice, which can be an important element in their recovery. Information for victims on their rights and on key dates and decisions is an essential aspect of participating in the proceedings, and it should be given in a way that victims understand. Victims should also be able to attend the trial and follow their case through.⁸⁷

Although the Directive does not specifically mandate that victims play an active role in criminal proceedings (as parties or participants, for example), the adoption of this instrument which is legally binding upon EU member states is significant as, similar to other

⁸³ *Ibid.*, Art. 4.

⁸⁴ European Parliament and Council of the European Union, *Directive 2012/29/EU of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime*, 25 October 2012.

⁸⁵ *Ibid.*, § 9.

⁸⁶ *Ibid.*, § 34.

⁸⁷ European Commission, *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Strengthening Victims' Rights in the EU*, COM (2011) 274, 18 May 2011, § 3.4.

documents adopted at the international and at the regional level, it explicitly affirms that the prosecution of crimes directly matters to victims of those wrongs. In other words, this instrument supports the view that victims have legitimate interests in the outcome of criminal proceedings and that they should be granted procedural rights in order to protect such interests. EU countries will have three years to transpose the provisions of the Directive into their national laws. It is remarkable that the UK and Ireland which, as we will see below, have traditionally not recognised victim standing in criminal proceedings, have declared that they will take part in the adoption and application of the Directive.⁸⁸

⁸⁸ Directive 2012/29/EU, *supra* note no. 87, § 70.

4 THE PRACTICE OF HUMAN RIGHTS SUPERVISORY BODIES

As noted above, a number of (mainly non-binding) international instruments have been recently adopted in relation to victims' rights in criminal proceedings. The majority of human rights treaties do not make explicit reference to the right of victims to have standing or to be heard in criminal proceedings. This is most probably due to the fact that, in order to have the wide support of states, these documents were drafted so as not to interfere with the margin of appreciation for the domestic practices of states. As will be noted below, however, bodies interpreting international human rights treaties have increasingly interpreted certain provisions as providing victims with rights within the criminal process, in part through a greater participatory role.

4.1 The Human Rights Committee

As examined in Chapter III, an emerging trend in the Human Rights Committee's ('HRC') interpretation of the Covenant on Civil and Political Rights increasingly requires criminal prosecution and punishment as a remedy for serious human rights violations. In contrast, the HRC has not, however, taken the position that victims ought to be granted rights in criminal proceedings as integral components of their right to remedy.⁸⁹ This question has been discussed in a number of cases after the Committee has found that merely disciplinary measures were insufficient to remedy the harm suffered by the complainants. Authors of individual communications referred to the new trend in the jurisprudence of the Committee and argued that there was a corresponding right for victims to call for criminal prosecution.⁹⁰ Nonetheless, the Committee maintained its traditional view that the Covenant does not provide for such a right, nor consequently any right to participate in some form in the criminal process.⁹¹

Similarly, in those cases where the Committee urged the state to expedite criminal proceedings against those responsible for serious violations of human rights, no reference has been made to a corresponding individual right for victims of such violations. For example, in

⁸⁹ HRC, *Sundara A.L. Rajapakse v. Sri Lanka* (Comm. No. 1250/2004), UN Doc. CCPR/C/87/D/1250/2004, 14 July 2006, § 9.3.

⁹⁰ HRC, *José Antonio Coronel et al. v Colombia* (Comm. No. 778/1997), UN Doc. CCPR/C/76/D/778/1997, 24 October 2002, § 3.5.

⁹¹ See e.g. HRC, *José Vicente and Amado Villafañe Chaparro et al. v. Colombia* (Comm. No. 612/1995), UN Doc. CCPR/C/60/D/612/1995, 29 July 1997, § 8.8; see also R. Aldana-Pindell, 'An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes', 26 *Human Rights Quarterly* (2004) 605-686, at 645-646.

Bautista de Arellana v. Colombia the Committee specified that, although there is no right for individuals to require that the State prosecute the crimes of another person, the state party is under a duty to prosecute, try and punish those responsible for gross human rights violations.⁹²

These pronouncements are difficult to rationalise. Is it possible to affirm that criminal prosecution is necessary as a remedy without acknowledging an individual right to claim it? In principle, once a measure is considered to be a remedy pursuant to Article 2(3) of the ICCPR, it is essential to acknowledge a corresponding right of the victim.⁹³ Therefore, the recognition of victims' rights in criminal proceedings would be a logical extension of the position of the HRC, extensively analysed in Chapter III, according to which victims' right to an effective remedy is a legal basis for the state's duty to prosecute and bring to justice those responsible for the violation.⁹⁴

It has been observed that the current contradiction in the Committee's case law is most probably due to the fact that this body has not settled yet the issue.⁹⁵ In particular, the Committee needs to clarify what the aim of criminal measures is. If prosecution is considered as a general means of protection against future human rights violations, then there is no need to recognise any individual right. But since, as Chapter III has shown, the practice of the HRC also demands criminal prosecution and punishment in the interests of the individual victim, it would seem logical to assume that the Committee shall elaborate corresponding rights for individuals in the criminal process.

4.2 The European Court of Human Rights

The jurisprudence of the European Court of Human Rights shows a growing acknowledgement of the symbolic nature of victims' participation in criminal proceedings. The Court has never recognised that under the European Convention on Human Rights ('ECHR') the victim has an absolute right to participate in domestic criminal proceedings if the domestic law does not provide for such a right. Nevertheless, although the degree of

⁹² HRC, *Bautista de Arellana v. Colombia* (Comm. No. 563/1993), UN Doc. CCPR/C/55/D/563/1993, 27 October 1995, § 8(6).

⁹³ A. Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (Oxford: Oxford University Press, 2009), at 25-27; but see A. O'Shea, *Amnesty for Crime in International Law and Practice* (New York: Springer, 2002), at 172-176: this author denies a right to demand punishment, but recognises its remedial function.

⁹⁴ See also J.C. Ochoa S., *The Rights of Victims in Criminal Justice Proceedings for Serious Human Rights Violations* (Leiden: Martinus Nijhoff Publishers, 2013), at 101-103.

⁹⁵ A. Seibert-Fohr, *Prosecuting Serious Human Rights Violations*, *supra* note no. 93, at 26.

participation may vary, the Court has established that the victim and his next of kin must be involved in the criminal process to the extent of securing their interests.

The Court, after an initial period in which it had rejected victims applications for violations of Article 6 of the ECHR (right to a fair trial) as being inadmissible *ratione personae*,⁹⁶ started relying on that provision in order to develop procedural rights for victims in criminal proceedings. The European Court, however, repeatedly held that in criminal proceedings it is not the right of the victim, such as the civil claim for compensation, which is at issue, but the State's demands for punishment.⁹⁷

Pursuant to this line of interpretation, the right to fair trial can be asserted by victims only where civil remedies depend on criminal prosecution. This was the case in *Perez v. France*, where the victim joined the criminal proceedings as a civil party.⁹⁸ However, in so doing, the European Court did not assume an individual right to justice. Even if a right to fair trial may be claimed by victims in those jurisdictions where civil claim depends on criminal prosecution, such a right derives from a victim's right to compensation and not to the prosecution of the alleged offender. Accordingly, the Court determined that the right to a fair trial:

[I]ncludes the right of the parties to the trial to submit any observations that they consider relevant to their case. The purpose of the Convention being to guarantee not rights that are theoretical or illusory but rights that are practical and effective ... , this right can only be seen to be effective if the observations are actually heard.⁹⁹

It further stated that 'the decisive factor for the applicability of Article 6(1) is whether, from the moment when the applicant is joined as a civil party until the conclusion of those criminal proceedings, the civil component remains closely connected with the criminal component.'¹⁰⁰ However, the Court did put restrictions on the right of victims to claim a violation under Article 6(1), clarifying that the Convention does not confer any right to private revenge and therefore 'the right to have a third party prosecuted or sentenced for a criminal charge cannot be asserted independently.'¹⁰¹

Throughout the last decade the Court's approach has progressively evolved towards greater protection of victims' rights in criminal proceedings with the parallel affirmation of

⁹⁶ S. Trechsel, *Human Rights in Criminal Proceedings* (Oxford: Oxford University Press, 2005), at 35.

⁹⁷ ECtHR, *Ramsahai and Others v. The Netherlands* (App. No. 52391/99), Judgment (Merits and Just Satisfaction), 15 May 2007, §§ 359-360.

⁹⁸ ECtHR, *Perez v. France*, *supra* note no. 69.

⁹⁹ *Ibid.*, at § 80.

¹⁰⁰ *Ibid.*, at § 67, citing *Calvelli and Ciglio v. Italy* (App. No. 32967/96), Judgment (Merits), 17 January 2002, § 62.

¹⁰¹ *Ibid.*, at § 70. However, at § 65 the Court used less strong language, noting that 'it is conceivable that Article 6 may be applicable even in the absence of a claim for financial reparation'.

the state's obligation to carry out effective official investigations that can lead to the identification and punishment of those found to be responsible in cases of gross violations of human rights. In particular, the Court has read Articles 2 (right to life), 3 (freedom from torture and inhuman or degrading treatment) and 13 (right to an effective remedy) as conferring upon victims certain participatory rights.

The Court has held that the procedural aspect of the state obligation to protect the right to life or to physical integrity, under articles 2 and 3 respectively, entails the effective access of victims (or their next of kin) to the investigatory procedure. The requirement of victim involvement in the investigation over the alleged violations has been applied in respect to states which have both civil law and common law criminal justice systems. For instance, in *Ogur v. Turkey*, a case concerning the killing of a mining company's guard by members of the Turkish security forces, the Court found that the respondent state had violated Article 2 on the basis, *inter alia*, of the lack of access by the victims' next of kin to the case file during the investigation stage, as well as of the failure to notify their lawyers of the decision to discontinue the prosecution against those allegedly responsible for the death of their relative.¹⁰²

Similarly, in the *Kelly and others v. United Kingdom* case, concerning the killing of nine men by security forces during an operation in Northern Ireland, the Court included the involvement of victims' relatives in the investigatory procedure among the criteria for an investigation to be effective:

[T]here must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next of kin of the victims must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.¹⁰³

¹⁰² ECtHR, *Ogur v. Turkey* (App. No. 21594/93), Judgment (Merits and Just Satisfaction), 20 May 1999, § 92: see also *Güleç v Turkey* (App. No. 21593/93), Judgment (Merits and Just Satisfaction), 27 July 1998, § 82; *Kaya v. Turkey* (App. Nos. 168/1996/777/978), Judgment (Merits and Just Satisfaction), 19 February 1998, § 107; *Bitiyeva and x. v. Russia* (App. Nos 57953/00 and 37392/03), Judgment (Merits and Just Satisfaction), 21 June 2007, § 156; *Anguelova v. Bulgaria* (App. No. 38361/97), Judgment (Merits and Just Satisfaction), 13 June 2002, § 140; *Slimani v. France* (App. No. 57671/00) Judgment (Merits and Just Satisfaction), 27 July 2004, §§ 44-49; *Rantsev v. Cyprus and Russia* (App. No. 25965/04), Judgment (Merits and Just Satisfaction), 7 January 2010, § 288.

¹⁰³ ECtHR, *Kelly and Others v. United Kingdom* (App. No. 30054/96), Judgment (Merits and Just Satisfaction), 4 May 2001, § 98; see also *McKerr v. United Kingdom* (App. No. 28883/95), Judgment (Merits and Just Satisfaction), 4 May 2001, § 109; *Hugh Jordan v. United Kingdom* (App. No. 24746/94), Judgment (Merits and Just Satisfaction), 4 May 2001, § 115; *Shanaghan v. United Kingdom* (App. No. 37715/97), Judgment (Merits and Just Satisfaction), 4 May 2001, § 92; *Finucane v. United Kingdom* (App. No. 29178/95), Judgment (Merits and Just Satisfaction), 1 July 2003, § 71.

The Court has further elaborated on the involvement of victims in criminal proceedings in the case of *Paul and Audrey Edwards v. United Kingdom*, concerning the killing of a man detained in prison by another prisoner. The Court, in particular, determined that victims of serious violations of human rights have legitimate interests in criminal proceedings because of ‘their close and personal concern with the subject matter of the inquiry’.¹⁰⁴ Accordingly, the Court found a violation of the procedural limb of Article 2 based, *inter alia*, on the fact that the applicants were excluded from criminal proceedings apart from merely providing testimony.¹⁰⁵

It should be noted that in a number of cases relating to states adopting civil law criminal procedure, the Court has found that the lack of the victim’s involvement in criminal proceedings not only violates the procedural aspect of the state’s obligation to protect the right to life or to physical integrity, but also violates the right to an effective remedy under Article 13 of the ECHR. This is so due to the fact that in most states which operate under civil law procedure compensation awards depend upon the outcome of the criminal case. Accordingly, the Court has found that, since the right to reparation depends on the outcome of the criminal process there is a close procedural relationship between the criminal proceedings and the remedies available to victims.¹⁰⁶ Victims must consequently have access to criminal justice in order to claim compensation where appropriate. In *Gül v. Turkey*, concerning the killing of a man by Turkish police officers, the Court found that the respondent state had violated both the procedural obligations deriving from Article 2 and the right to an effective remedy based on the fact that victims had not been informed about the criminal proceedings against the person allegedly responsible for the killing and had been denied the opportunity to tell the court their version of events.¹⁰⁷

Conversely, the failure to recognise victims’ rights in criminal proceedings has been read as a violation of the procedural obligations deriving from Article 2 only, without being seen as a violation of the right to an effective remedy in cases where civil compensation does not depend on criminal proceedings, as is the case in most common law systems. For example, in cases relating to the UK, the Court has found that the denial of victims’

¹⁰⁴ ECtHR, *Paul and Audrey Edwards v. United Kingdom* (App. No. 46477/99), Judgment (Merits and Just Satisfaction), 14 March 2002, § 84.

¹⁰⁵ *Ibid.*, § 87.

¹⁰⁶ E.g. *Kaya v. Turkey*, *supra* note no. 102, § 107.

¹⁰⁷ *Gül v. Turkey* (App. No. 22676/93), Judgment (Merits and Just Satisfaction), 14 December 2000, §§ 95, 102; see also *Orhan v. Turkey* (App. no. 25656/94), Judgment (Merits and Just Satisfaction), 18 June 2002, §§ 346, 348, 387, 396.

participatory right in inquest proceedings violated Article 2, but has declined to find a violation of Article 13 since victims could still obtain a remedy from civil proceedings.¹⁰⁸

All in all, a review of the European Court's jurisprudence shows increasing consideration of the need to ensure certain rights to victims in criminal proceedings, either as a form of primary protection or as a remedy. The above examination shows that victims' rights in criminal proceedings are increasingly recognised even in those systems where no relation exists between criminal conviction and civil claims for compensation of damages. Arguably, this is an indication of the growing recognition of the fact that victims have a legitimate interest in seeing their perpetrator prosecuted and that the state should guarantee the promotion and protection of this interest in criminal proceedings.

So far the Court has not, however, recognised that under the Convention, and more specifically, under Article 13, victims have an absolute right to participate in criminal proceedings. As observed above with reference to the Human Rights Committee, this approach is likely to change in the coming years as criminal accountability is increasingly read into victims' right to an effective remedy. If the Court will confirm its position that the obligation of states to prosecute serious violations of human rights is an integral component of victims' right to effective remedy, as pointed out in Chapter III, then it will necessarily need to recognise that victims hold certain participatory rights in criminal proceedings in order to enforce such a right. The distinction between the procedural systems of the state in question is also likely to lose its relevance for the determination of the norm violated when victims are not granted participatory rights in criminal proceedings. Since prosecution and punishment are considered elements of the remedy themselves, it is correct to affirm that the failure to recognise victims' rights in the criminal process violates the right to effective remedy, regardless of the procedural system of the state in question and of the availability of alternative means of redress from civil proceedings.

4.3 The Inter-American System for the Protection of Human Rights

Both the Inter-American Commission ('IAComHR') and the Inter-American Court of Human Rights ('IACtHR') have long emphasised the importance of the participation of victims in criminal proceedings. In the early 1990s the Commission held that in those jurisdictions where victims have the right to participate in criminal proceedings the denial of such a right is contrary to the right to fair trial under Article 8(1) of the American Convention on Human

¹⁰⁸ E.g., *Hugh Jordan v. United Kingdom*, *supra* note no. 92, §§ 161-162.

Rights ('ACHR').¹⁰⁹ In later pronouncements, the Commission even went so far as to find that this right does not depend on the existence of a right in domestic law entitling victims to file criminal charges, thus recognising the need to allow victims to participate in the proceedings regardless of the criminal model adopted.¹¹⁰

Victims' participation has been increasingly read as deriving not only from the right to fair trial, but also from the right to judicial guarantees (Article 25). More precisely, the Commission has found that this right implies that victims are capable of instigating criminal proceedings,¹¹¹ having a case investigated and of participating in criminal proceedings.¹¹² In more recent decisions the Commission has called on states to respect the victims' 'right to obtain justice' through effective recourse against those responsible for the violations in question.¹¹³

The Inter-American Court has also upheld this interpretation. Indeed, although it originally confined Article 8(1) to the rights of the accused in criminal trials, since 1998 the Court has recognised that fair trial rights also apply to the participation of victims in criminal proceedings.¹¹⁴ In the *Street Children* case the Court set out the prerequisites for a fair trial regarding the role of victims in criminal proceedings and explained that:

[It] is evident from Article 8 of the Convention that the victims of human rights violations and their next of kin should have substantial possibilities of being heard and acting in the respective proceedings, both in order to clarify the facts, and punish those responsible, and to seek due reparation.¹¹⁵

Similarly, in the *Caracazo v. Venezuela* case, concerning the killing and disappearance of more than two hundred persons by Venezuelan security forces, the Court noted that victims and their relatives had been denied access to the case files and found accordingly that there had been a violation of the right to a fair trial and the right to judicial protection. In the reparation judgment, the Court ordered:

[T]hat the next of kin of the victims and the surviving victims must have full access and the power to act at all stages and in all proceedings during said investigations, in accordance with domestic legislation and the

¹⁰⁹ IAComHR, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375, *Mendoza et al. v. Uruguay*, 2 October 1992, § 40.

¹¹⁰ IAComHR, Case 10843, *Garay Hermosilla v. Chile*, 15 October 1996, § 64; Case 10.480, *Lucio Parada Cea et al. v. El Salvador*, 27 January 1999, § 119.

¹¹¹ *Garay Hermosilla*, *supra* note no. 110, § 63.

¹¹² *Mendoza et al. v. Uruguay*, *supra* note no. 109, §§ 40-46.

¹¹³ IAComHR, Case 11.725, *Carmelo Soria Espinoza (Chile)*, 19 November 1999, § 81.

¹¹⁴ IACtHR, *Blake v. Guatemala*, Judgment (Merits), 24 January 1998, § 96; *Paniagua Morales et al. v. Guatemala*, Judgment (Merits), 8 March 1998, § 153.

¹¹⁵ IACtHR, *Villagrán Morales et al v. Guatemala*, Judgment (Merits), 19 November 1999, § 227.

provisions of the American Convention on Human Rights, and that the results of those investigation be made known to the public.¹¹⁶

In substance, the Court recognised that victims have an essential stake in the criminal proceedings as a whole. This was further explained in the *Blake* case, where the Court established:

Article 8(1) of the American Convention recognizes the right of Mr. Nicholas Blake's relatives to have his disappearance and death effectively investigated by the Guatemalan authorities; to have those responsible prosecuted for committing said unlawful acts; to have the relevant punishment, where appropriate, meted out; and to be compensated for the damages and injuries they sustained.¹¹⁷

The progressive expansion of the traditional meaning of the right to fair trial can be linked to the corresponding interpretation of prosecution and punishment of those responsible for serious violations of human rights as an individual right and, more precisely, as an integral element of the right to judicial protection in cases of serious human rights violations, as shown in Chapter III. Indeed, victims' rights to access to and participation in criminal proceedings are directly based on the same provision on which the Court has based the right to criminal justice, namely Article 25, read in conjunction with the right to fair trial.¹¹⁸

In this sense, it has been observed that the right to a fair trial, as interpreted by the Inter-American institutions, goes beyond purely procedural due process.¹¹⁹ The right to a fair trial is evaluated in the broader context of victims' right to justice. A combined reading of Articles 25 and 8(1) shows that, in cases of serious violations of human rights, victims are entitled to a broad array of rights in criminal proceedings ranging from the right to have criminal proceedings instituted against perpetrators to the right to exercise certain participation rights in the proceedings in order to safeguard their interests in the prosecution of their abusers.

In general terms, apart from holding that victims should play a role in the criminal process, with an emphasis on the investigation stage,¹²⁰ the Court has not prescribed the exact form participation should take. Like its European counterpart, the Inter-American Court must take into account the specific procedural laws applicable in member states. The Court has

¹¹⁶ IACtHR, *El Caracazo v. Venezuela*, Judgment (Reparations and Costs), 29 August 2002, § 118 and 143.1.

¹¹⁷ IACtHR, *Blake v. Guatemala*, *supra* note no. 114, § 97.

¹¹⁸ R. Aldana-Pindell, 'An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes', *supra* note no. 91, at 668.

¹¹⁹ A. Seibert-Fohr, *Prosecuting Serious Human Rights Violations*, *supra* note no. 93, at 62; D. Cassel, 'The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights', in K. de Feyter, S. Parmentier, M. Bossuyt, and P. Lemmens (eds), *Out of the Ashes*, *supra* note no. 60, 191-223, at 203-204.

¹²⁰ IACtHR, *Durand and Ugarte v. Peru*, Judgment (Merits), 16 August 2000, § 143.

specified that victims must be granted rights to participate in these proceedings, ‘in accordance with domestic laws’ and convention rights.¹²¹ However, in the view of the Court, victims *must* have access to courts and base such a right directly in the provisions of the ACHR. In other words, the Court has found a general principle of a victim’s right to have full access to proceedings, meaning that victims should be given standing to participate in all phases before courts investigating human rights violations.¹²² This also includes the capacity to take part in and present evidence at all stages of investigations and proceedings. In addition, in at least two cases the Court has even awarded costs for their future expenses of doing so.¹²³ In cases of serious violations of human rights such as forced disappearances, the Court has considered the duty to investigate, prosecute and punish those responsible and the corresponding right of victims of access to justice as *jus cogens*.¹²⁴

In conclusion, it can be observed that the Inter-American institutions have been more inclined towards the recognition of victims’ rights in criminal proceedings, compared to their global and regional counterparts. Admittedly, however, the willingness of these institutions can be attributed to some extent to the fact that most of the cases related to victims’ rights have arisen in jurisdictions which allow victims’ participation as civil parties in criminal proceedings and, as such, the Inter-American bodies found less obstacles to recognising victims a broad array of participatory rights.

4.4 The African System for the Protection of Human Rights

At the time of writing, the African Court of Human and People’s Rights has not considered the issue of the recognition of victims’ rights in criminal proceedings. As observed in Chapter 1, while it can be argued that the right to remedy is implicit in every human right treaty, the African Charter does not mention the right to a remedy or the right of access to justice. Therefore, it cannot be assumed that the jurisprudence of the African Court will be similar to that of the ECtHR or the IACtHR. The most likely avenue for the African Court to do so would be to affirm victims’ rights in criminal proceedings through the interpretation of the

¹²¹ IACtHR, *Bámaca Velásquez v. Guatemala*, Judgment (Reparations and Costs), 22 February 2002, § 106; *El Caracazo v. Venezuela*, Judgment (Reparations and Costs), 29 August 2002, § 143; *Juan Humberto Sánchez v. Honduras*, Judgment (Preliminary Objections, Merits, Reparations, and Costs), 7 June 2003, § 186.

¹²² R. Aldana-Pindell, ‘An Emerging Universality of Justiciable Victims’ Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes’, *supra* note no. 91, at 668.

¹²³ IACtHR, *Myrna Mack-Chang v. Guatemala*, Judgment (Merits, Reparations and Costs), 25 November 2003, § 301.

¹²⁴ IACtHR, *Goiburú et al v. Paraguay*, Judgment (Merits, Reparations and Costs), 22 September 2006, §§ 84, 131; *La Cantuta v. Peru*, Judgment (Merits, Reparations, and Costs), 29 November 2006, § 157.

right to a fair trial. Indeed, the African Charter on Human and Peoples' Rights ('AfrCHPR') contains a provision stating that '[e]very individual shall have the right to have his cause heard',¹²⁵ without limiting such a right to persons charged with a criminal offense (such as is the case under Article 6(1) of the ECHR).

This interpretation seems to be confirmed by the practice of the African Commission on Human and Peoples' Rights. While the Commission has not thus far had the opportunity to deal with victims' rights in criminal proceedings explicitly, it is remarkable that in the 2001 *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, it included victims' rights in criminal proceedings within the concept of fair trial rights.¹²⁶ More precisely, the Principles establish that the right to an effective remedy is a fair trial right and that it includes access to justice, reparation for the harm suffered and access to information concerning the violations.¹²⁷

In addition, the document recognises that victims should be treated with respect and be entitled to mechanisms of justice and redress, and ought to be informed of their role as well as of any relevant development of the criminal case.¹²⁸ Most importantly, the Principles include a provision which is phrased similarly to Article 6(b) of the 1985 Declaration and that requires judicial officers, prosecutors and lawyers to 'facilitate the needs of the victims' by:

Allowing their views and concerns to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.¹²⁹

In sum, the African institutions potentially allow for a progressive affirmation of victims' rights in criminal proceedings. However, the fact that victims' participation is conceived as an element of the right to a fair trial and not as a component of the right to remedy may have two main consequences on the effective access of victims to the criminal process. Firstly, victims' participatory rights may have to be balanced with the defendant's fair trial rights, the two being placed on the same level; and secondly, victims' fair trial rights may be balanced with other public interests. Conversely, the recognition of victims' participation as a remedy not only contributes to strengthening the position that victims have a right to the prosecution of human rights offenders, but also ensures that such a right is not frustrated at the expenses of the protection of other interests.

¹²⁵ Art. 7 AfrCHPR.

¹²⁶ AfrComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance*, 2001.

¹²⁷ *Ibid.*, Part C(b).

¹²⁸ *Ibid.*, Part P(a) and (f)

¹²⁹ *Ibid.*, Part P(f)(ii).

5 DOMESTIC CRIMINAL JUSTICE SYSTEMS AND VICTIMS' RIGHT TO JUSTICE

As has been discussed in the previous sections a number of instruments adopted at the international and regional level, as well as the practice of human rights supervisory bodies, consistently support the view that victims ought to be granted some participatory rights in criminal proceedings in order to promote and protect their right to justice. However, these documents and decisions have not established that the right to justice demands the recognition of victims as parties to the proceedings having full participatory rights. Rather, they have acknowledged that victims' participation may vary considerably according to the criminal model adopted.

Although human rights bodies remain reluctant in terms of elaborating a specific set of participatory rights corresponding to victim's right to justice, some recent instruments adopted at the international and regional level mentioned above have established that victims should be empowered with certain procedural rights in order to exercise their right to justice. In particular, some of these instruments have set out that victims should have the right to challenge the decision of public prosecutors not to prosecute, either by way of judicial review or by authorising parties to engage in private prosecutions.¹³⁰

Arguably, both of these rights to initiate prosecutions and challenge decisions not to prosecute lie at the very core of victims' right to justice. Indeed, affirming that a victim has a right to justice, that is to the prosecution of perpetrators in other words, is not simply a question of providing the victim with the power to report an offence. Nor is it simply a question of the significance of the complaint or similar procedure as a precondition for instituting proceedings, the initiative of which is in the hands of others. As a matter of fact, if the decision is taken not to initiate or to terminate the prosecution of an alleged offender, the victim potentially loses his chances of achieving justice.

As such, the final determination of whether or not to prosecute lying with the public prosecutor only is not compatible with the victim's right to justice. Therefore, what matters is that the victim can have a role analogous to that of a person entitled to bring a civil case, being able to initiate a criminal action either as complementary, or a complete alternative, to a public prosecution.

¹³⁰ Council of Europe, *Recommendation No. R (85) 11*, *supra* note no. 3, Art. 7; Id., *Recommendation R. (2000) 19*, *supra* note no. 76, Art. 34; *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, *supra* note no. 63, Principle 19.

Providing a complete comparative analysis of victims' rights in domestic criminal systems of course falls outside the scope of the present thesis. However, the following section provides an overview of how the right to initiate criminal prosecution and to challenge decisions not to prosecute have been implemented in domestic systems with a view to verifying whether any common practice between jurisdictions is emerging. After analysing these rights, the following section will also discuss the progressive affirmation of victims' participatory rights in criminal proceedings of various domestic systems, including in those systems where victims have not been traditionally considered parties to proceedings. Although, as stated above, victims' participation cannot be considered as a component of the right to justice as such, it is argued that the progressive introduction of victims' rights in criminal proceedings highlights the need to take into account the views of victims and, eventually, to acknowledge that victims have, at a minimum, a legitimate interest in the outcome of the proceedings.

5.1 The Right to Initiate a Criminal Prosecution

In modern societies, the enforcement of criminal law is generally entrusted to public authorities such as a public prosecutor or a magistrate. Historically, however, most crimes were prosecuted privately. For instance, in Classical Athens judicial proceedings could be initiated by any citizen, including the victims of the crime, as no public prosecutor existed.¹³¹ Under Roman law, a criminal prosecution could be initiated by the victim of the crime or by any Roman citizen.¹³² In most cases, a person injured by the conduct of another could bring either a criminal action against the wrongdoer or, alternatively, a private action, known as a delictual action, seeking the punishment of the wrongdoer.

Prosecution of crime remained in the hands of private individuals until recent times in many legal systems. For instance, in England until the middle of the nineteenth century the responsibility for the initiation of criminal prosecution in the courts rested on the victim.¹³³ Indeed, criminal offences were conceptualised as a private matter to be settled between the victim and the offender and outside the state's immediate interests.¹³⁴

¹³¹ D.M. MacDowell, *The Law in Classical Athens* (New York: Cornell University Press, 1987) 53-66; A. Lanni, 'Publicity and the Courts in Classical Athens', 24 *Yale Journal of Law and Humanities* (2012) 119-135.

¹³² H.F. Jolowicz and B. Nicholas, *Historical Introduction to the Study of Roman Law*, 3rd ed. (Cambridge: Cambridge University Press, 1972), at 305 ff.

¹³³ This is discussed in some detail in a classic article by M. Ploscowe, 'The Development of Present-Day Criminal Procedures in Europe and America', 48 *Harvard Law Review* 433 (1935) 433-473, at 437-441.

¹³⁴ J. Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties*, *supra* note no. 14, at 2-4.

By the end of the nineteenth century, however, in almost all legal systems public authorities had assumed almost exclusive responsibility for prosecuting criminal cases. The development of criminal law was a corresponding instrument through which the state promoted the security of the nation and the idea that crime is a wrong against the public order and not only against the interests of an individual.¹³⁵

That said, the right to private prosecution, in one form or another still exists in many legal systems around the world.¹³⁶ With the development of criminal law as a form of public law enforceable by the state, the *raison d'être* of the right to private prosecution can be read, nowadays, as a safeguard for the victim against arbitrary decisions of public authorities to dismiss his case or to refuse to initiate any action against the alleged offender.¹³⁷

First of all, a distinction has to be made between the right to exclusive private prosecution and the right to subsidiary private prosecution. The right to exclusive private prosecution gives to the victim only, and not to the public prosecutor, the right to prosecute the offence in question. This type of private prosecution is normally associated with minor offences where there is relatively less public interest in prosecution such as in the case of libel and defamation. The right to subsidiary private prosecution refers, instead, to those situations where, the public prosecutor having refrained from prosecution, a private prosecution may be initiated by the victim. This section will focus on subsidiary private prosecution as this is the form of private prosecution which is relevant in relation to the types of violations examined in the present thesis, namely gross violations of human rights.

A common aspect of the various models of the right to subsidiary private prosecution is that such a right is never conceived as absolute; rather, it is subject to different forms of control. As will be discussed further in the following sections, in some systems the court may refuse to allow a private prosecution to continue whilst in other systems the prosecutor is entitled or obliged to take over a private prosecution and, subsequently, may have the power to discontinue it. Furthermore, certain systems require the victim to constitute himself as a civil claimant to act as private prosecutor. Three main models of initiating criminal proceedings by way of private prosecution can be identified: (i) the 'private prosecutor' model, (ii) the 'civil claimant model', and (iii) the 'direct summons' model.

¹³⁵ P. Rock, 'Victims, Prosecutors and the State in Nineteenth Century England and Wales', 4 *Criminology and Criminal Justice* (2004) 331-354.

¹³⁶ For a comparative analysis of the various private prosecution models in Europe, see M.E.I. Brien and E.H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems*, *supra* note no. 20, at 1062-1065.

¹³⁷ *Ibid.*, at 1063.

5.1.1 *The 'Private Prosecutor' Model*

The practice of using private counsel to prosecute criminal offenses is well established in English common law. As stated previously, until the late nineteenth century English criminal procedure relied heavily on a system of private prosecution even for serious offences. Although the idea of the privately-retained prosecutor is largely an historical one, remnants of the private prosecution model remain today. In fact, a small number of jurisdictions still permit private individuals, such as victims, to initiate criminal proceedings.¹³⁸

The most notable example of private prosecution is certainly that applied in England and Wales, where all members of the public, including victims, may exercise their historical right to bring a private prosecution in view of their shared interest in enforcing criminal law.¹³⁹ As with public prosecutions, a private prosecution is initiated by making a formal complaint to the Magistrates' courts, a procedure known as 'laying an information'.¹⁴⁰ This procedure involves 'giving a magistrate a concise statement (an information), verbally or in writing, of an alleged offence and the suspected offender, so that he can take steps to obtain the appearance of the suspect in court.'¹⁴¹

In practice, however, this right is limited to such an extent that is only rarely used.¹⁴² The main obstacles to such action are two. Firstly, individuals initiating private prosecutions do not receive any legal aid and as such the costs of such an action may be an obstacle to the exercise of the right.¹⁴³ Secondly, and most importantly, the Attorney General, the Director of Public Prosecution or the magistrate issuing the initial summons may withhold consent to the private prosecution or order that the proceedings be discontinued if their continuation would be contrary to public interest.¹⁴⁴ For instance, private prosecutions can be discontinued in cases where the prosecution interferes with the investigation of another criminal offence or of another criminal charge, where it can be said that the prosecution is vexatious,¹⁴⁵ or malicious (where the public prosecutor is satisfied that the prosecution is being undertaken on malicious

¹³⁸ See *supra* note no. 136.

¹³⁹ UK, Prosecution of Offences Act 1985, section 6(1).

¹⁴⁰ P. Hungerfold Welch, *Criminal Procedure and Sentencing*, 6th ed. (London: Cavendish, 2004), at 2.

¹⁴¹ J. Law and E.A. Martin, *A Dictionary of Law*, 7th ed. (Oxford: Oxford University Press, 2009).

¹⁴² J. Doak, Victims' Rights, *Human Rights and Criminal Justice*, *supra* note no. 14, at 125.

¹⁴³ *Ibid.*

¹⁴⁴ UK, Prosecution of Offences Act 1985, section 6(2).

¹⁴⁵ UK, Senior Courts Act 1981, Section 42 (as amended by Section 24 of the Prosecution of Offences Act 1985).

grounds) and where the prosecuting authorities have promised the defendant that he will not be prosecuted at all (a promise of immunity from prosecution).¹⁴⁶

Finally, the Crown Prosecution Service may decide to take over the prosecution if there is sufficient evidence and it appears to be a case that merits the prosecution being conducted by a public prosecuting authority rather than by a private individual. This may be because, for example, the offence is serious, there are detailed disclosure issues to resolve, the prosecution requires the disclosure of highly sensitive material or the conduct of the prosecution involves applications for special measures or for witness anonymity.¹⁴⁷

5.1.2 The ‘Civil Claimant’ Model

In certain jurisdictions of civil law origin, such as in France and Belgium, the victim may initiate criminal proceedings by constituting him or herself as a civil claimant (*plainte avec constitution de partie civile*).¹⁴⁸ A prerequisite for such action is that the victim has to be prejudiced by a serious misdemeanour or a felony that has not been brought before the court. The effect of the action is the seizure of the examining magistrate, who is then under the obligation to investigate the case as presented in the *plainte*.¹⁴⁹ After the investigation, the public prosecutor may, however, still decide to discontinue the prosecution.

The right of the victim to initiate a criminal prosecution – despite the absence of a decision of the public prosecutor, or contrary to his decision – was first elaborated in the famous *Laurent-Atthalin* case of 1906 in the following terms, which remained unchanged until present:

[L]e droit pour partie civile de mettre en mouvement, à ses risques et périls, l’action publique devant le juge d’instruction, s’accorde et se coordonne avec toutes les autres dispositions qui, notamment dans les textes précités, établissent, pour cette partie, un droit parallèle à celui du ministère public ... Le juge d’instruction, saisi, conformément à l’article 63 [current article 85 of the Code de Procédure Pénale] d’une plainte avec constitution de partie civile a la devoir d’informer sur la plainte dans telle mesure qu’il appartiendra.¹⁵⁰

While there is evidence to suggest that parties do exercise their right to be heard and to pursue civil claims, it appears that victim-initiated prosecutions in France are in progressive

¹⁴⁶ UK, Queen’s Bench Division, *Turner v. Director of Public Prosecutions* [1979] 68 Criminal Appeals Reports 70.

¹⁴⁷ The Crown Prosecution Service, ‘Private Prosecution’, available online at http://www.cps.gov.uk/legal/p_to_r/private_prosecutions/index.html#an05 (last visited on 26 June 2013).

¹⁴⁸ Belgium, Code d’instruction criminelle, Art. 63; France, Code de procédure pénale, Art. 85.

¹⁴⁹ B. Bouloc, *Procédure Pénale*, 23rd ed. (Paris: Dalloz, 2012), at 296-297.

¹⁵⁰ France, Cour de Cassation, *Laurent-Atthalin*, 8 December 1906.

decline.¹⁵¹ This may be attributed to the increase in the number of public prosecutions following a report.¹⁵² Moreover, a recent amendment to the Code de procédure pénale has considerably limited the right to initiate a prosecution, establishing that civil parties may initiate a criminal action only if, after having reported the crime, the prosecutor decides not to bring a public prosecution or does not respond within three months of the report.¹⁵³

5.1.3 *The 'Direct Summons' Model*

A third model by which criminal proceedings could be initiated is by issuing a direct summons. This option allows the victim, under certain conditions, to summon the offender directly before the competent judge and is generally limited to less serious offences. As such, it is only in part relevant to the analysis carried out in this thesis.

The 'direct summons' model operates in many civil law countries and certain common characteristics can be identified.¹⁵⁴ In particular, victims may summon the offender directly to court, subject to three main conditions: (i) that the offence at issue is a misdemeanour and not a felony, (ii) that no writ of summons has been presented by the public prosecutor, and (iii) that no decision has been taken by the examining magistrate to bring the case to court.¹⁵⁵ A practical condition is that the victim needs to know the offender's identity in order to summon him.

Issuing a direct summons allows victims to bypass the decision of the public prosecutor not to prosecute. In this sense, victims can make sure that the competent court decides on their case. Several measures have been adopted, however, with a view to discouraging frivolous private actions, in addition to the conditions mentioned above.¹⁵⁶ If the victim summons the alleged offender to court, he may be asked to pay a deposit to cover the potential costs of the action, unless they are entitled to legal aid. Furthermore, the victim may be held liable for legal cost if the accused is found not guilty. Finally, if the accused is

¹⁵¹ M.E.I. Brien and E.H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems*, *supra* note no. 20, at 322.

¹⁵² F. Casorla, 'L'approche du magistrat', 68 *International Review of Penal Law* (1997) 83-101, at 92.

¹⁵³ Loi no. 2011-1862 du 13 décembre 2011 relative à la répartition des contentieux et à l'allègement de certaines procédures juridictionnelles, Art. 59.

¹⁵⁴ Countries that allow victims to initiate criminal proceedings through direct summons include France (Art. 551 Code de Procédure Pénale), Belgium (Art. 64 Code d'instruction criminelle), and Luxembourg (Art. 381 Code d'instruction criminelle).

¹⁵⁵ M.E.I. Brien and E.H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems*, *supra* note no. 20, at 137 (Belgium), 321-322 (France), and 586-587 (Luxembourg).

¹⁵⁶ *Ibid.*

acquitted, he may claim damages in criminal or civil courts from the victim who brought the case.

5.1.4 Some Reflections on the Right of Private Prosecution

From the analysis carried out it appears that the practical value of the right to private prosecution does not correspond with the substantial support for it that is voiced in international documents. Studies on private prosecution in practice report that such a right is only rarely used.¹⁵⁷ Even if in some jurisdictions private prosecution is utilised with some regularity, it is often in relation to minor offences, where public prosecution was not initiated for on account of a lack of public interest. Regarding serious offences, considerable obstacles have been put in place designed to deter actions of private prosecutors, such as the risk of being ordered to pay full costs if the case is unsuccessful.

It is submitted that the existence of these obstacles on the effective exercise of the right of private prosecution reflects a widely-shared objection to such institution. Indeed, in recent years, private prosecution arrangements have come under serious criticism on due process grounds.¹⁵⁸ It has been argued that, in effect, in allowing such private prosecutions the legal system permits a private party to pursue private revenge utilising criminal law and that this in turn jeopardises the principle of prosecutorial independence. The fact that this practice is not widely recognised at the international level and it is generally subjected to considerable limitations suggests that there may be a better way of conferring upon victims means to enforce their right to justice, such as enhancing victims' rights within the public model of prosecution.¹⁵⁹

5.2 The Right to a Review of the Decision not to Investigate or Prosecute

One way to enhance victims' rights within the public model of prosecution is by providing them the right to review decisions not to initiate or proceed with prosecution. Indeed, through

¹⁵⁷ M.E.I. Brien and E.H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems*, *supra* note no. 20, at 1065.

¹⁵⁸ A. Sidman, 'The Outmoded Concept of Private Prosecution', 25 *American University Law Review* (1976) 754-794, at 755 (arguing that private prosecution is 'outdated, unnecessary, unethical, and perhaps unconstitutional'); J.D. Bessler, 'The Public Interest and the Unconstitutionality of Private Prosecutors', 47 *Arkansas Law Review* (1994) 511-602 (highlighting due process arguments against private prosecutions); M.S. Nichols, 'No One Can Serve Two Masters: Arguments Against Private Prosecutors', 13 *Capital Defense Journal* (2001) 279-305.

¹⁵⁹ J. Gittler, 'Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems', 11 *Pepperdine Law Review* (1984) 117-182, at 125-131.

the exercise of this right, victims are granted a special status in criminal action whilst acknowledging at the same time the normative role of the state in prosecuting crime.

As mentioned in the introduction to this section, this right is very important for the concrete enforcement of victim's right to justice. As a matter of fact, an absolute power of the public prosecutor to decide over criminal action would be in contradiction with the gradual affirmation of a victim's right to justice. For this reason, it seems legitimate to grant victims some control on prosecutorial decision-making by way of access to review mechanisms with a view to checking the appropriateness of a prosecutor's decision not to go forward.

The number of states which do not grant opportunities for review of a decision not to prosecute has considerably declined in recent years under the influence of documents adopted at the international and regional level setting out such a right. Arguments put forward by states that do not provide victims with opportunities for review are various. In certain jurisdictions, such as Scotland, it is argued that once the accused has been informed that no action will be taken against him it would be unlawful to review that decision.¹⁶⁰ In other systems, such as in France prior to the 2004 reform that will be addressed below, the decision of the public prosecutor not to prosecute was a decision of an administrative nature which, as such, could not be appealed.¹⁶¹

Certain other systems such as Belgium, although not allowing for a right to a review, nonetheless provide victims with the right to initiate a criminal prosecution if the prosecutor has declined to do so, as discussed above.

Like the right to private prosecution, the right to a review of the decision not to prosecute may assume different forms. The simplest option is the non-institutionalised review where, despite the fact a right to review is not established by law, the practice has developed that any complaint addressed to the public prosecutor about the dismissal of a case is accepted and the initial decision is reconsidered. For instance, a non-institutionalised practice of review has been developed by the office of the Director of Public Prosecutions in Ireland. Victims who send a letter to the Office asking for reconsideration of the decisions not to prosecute generally succeed in having the case reviewed.¹⁶²

Institutionalised forms of review are, on the other hand, explicitly provided for in law. The following sub-sections focus on this latter form of review since non-institutionalized practices cannot be correctly considered as a right accruing to victims of crime. Within the

¹⁶⁰ M.E.I. Brien and E.H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems*, *supra* note no. 20, at 1066.

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

formal right to a review, two different forms can be distinguished on the basis of the authority competent to review the decision: (i) the right to a review made by a higher ranking official within the same authority who issued the decision not to prosecute; and (ii) the right to a review made by a judicial authority.

5.2.1 Review by a Higher Ranking Official

In certain jurisdictions, victims may ask for a review of the decision not to prosecute to a higher ranking official within the same authority which issued the decision not to prosecute. For instance, in Greece, if the public prosecutor decides to dismiss the prosecution, the victim may apply to the prosecutor of the court of appeal for a review.¹⁶³ Likewise, in Germany, the complainant who is also the aggrieved party may appeal against the decision of the prosecutor not to open an investigation or to initiate a prosecution on account of the lack of sufficient suspicion of an offence. The request for appeal is made to the highest-ranking prosecutor in the prosecutor's office at issue.¹⁶⁴ Differently from Greece, where there is a right to a review in one instance only, in Germany a further request for a review can be made in second instance to a court of law, as I will discuss further.

A recent amendment to the French Code de Procédure Pénale has introduced the right of victims to appeal the public prosecutor's decision to drop proceedings (*classement sans suite*) by writing a letter to the Prosecutor General of the Court of Appeal. The Prosecutor General, seized of the matter, may reverse the decision of the public prosecutor and order to the latter to initiate criminal proceedings.¹⁶⁵

5.2.2 Judicial Review

In jurisdictions that provide victims with judicial review, the review of the decision not to prosecute is carried out by an examining magistrate or a court of law. This is the most stringent form of review and it can be found in an increasing number of states.

As mentioned above, in Germany, if the chief prosecutor upholds the decision of the public prosecutor to terminate proceedings, the victim can appeal such decision and ask for a review in second instance to a court of law. Through this procedure, known as

¹⁶³ *Ibid.*; European Commission, 'Rights of Victims of Crime in Criminal Proceedings: Greece', available online at https://e-justice.europa.eu/content_rights_of_victims_of_crime_in_criminal_proceedings-171-EL-en.do?clang=en&idSubpage=1&member=1 (last visited on 26 June 2013).

¹⁶⁴ M.E.I. Brien and E.H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems*, *supra* note no. 20, at 1066.

¹⁶⁵ French Code of Criminal Procedure, Art. 40(3); Loi no. 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité.

Klageerzwingungsverfahren, victims have a right to obtain an order of the court in the case of persistent inaction of the public prosecutor.¹⁶⁶ This mechanism has inspired similar procedures in other countries to give more weight to victims even when the prosecutor decides to drop charges.

For instance, in Italy, the decision not to proceed with a criminal action (*archiviazione*) lies with the pre-trial judge overseeing the inquiry (*giudice delle indagini preliminari*) upon request of the public prosecutor.¹⁶⁷ The victim, provided that he has asked to be kept informed of the developments of the case, will be notified of the request of the prosecutor¹⁶⁸ and can state his objection to the motion to drop charges.¹⁶⁹ This may result in a hearing, instigated by the victim, debating the outcome of the investigation. Following the hearing, the judge can decide either to uphold the request of the prosecutor or to order the prosecutor to proceed with the case.¹⁷⁰ Similarly, in The Netherlands, the victim can appeal the decision of the public prosecutor not to prosecute by asking for a review of the decision in the court of appeal.¹⁷¹ It is interesting that the victim can also appeal the decision of the prosecutor to initiate the case if he believes that the offender should be prosecuted for a more serious crime than the one chosen by the prosecutor.¹⁷²

A noteworthy case relating to the development of a right to a review of the decision not to prosecute is that of the United Kingdom. For many years prosecutors were reluctant to reopen decisions not to prosecute and as a result victims found it difficult to persuade prosecutors to reconsider their decision. This was the case since the only avenue for a review of the decision not to prosecute available to victims was a request to the High Court. Such a request has traditionally had little chance of success since the Court would only make a ruling against the decision of the prosecutor if this decision appeared to be completely unreasonable.¹⁷³ Furthermore, even if the High Court found that the decision was

¹⁶⁶ M. Chiavario, 'Private Parties: The Rights of the Defendant and the Victim', *supra* note no. 4, at 544.

¹⁶⁷ Italian Code of Criminal Procedure, Art. 408.

¹⁶⁸ *Ibid.*, Art. 408(2).

¹⁶⁹ *Ibid.*, Art. 410.

¹⁷⁰ *Ibid.*, Art. 409.

¹⁷¹ European Commission, 'Rights of Victims of Crime in Criminal Proceedings: The Netherlands', available online at https://e-justice.europa.eu/content_rights_of_victims_of_crime_in_criminal_proceedings-171-NL-en.do?clang=en&idSubpage=1&member=1#n12 (last visited on 26 June 2013).

¹⁷² *Ibid.*

¹⁷³ European Commission, 'Rights of Victims of Crime in Criminal Proceedings: England and Wales', available online at https://e-justice.europa.eu/content_rights_of_victims_of_crime_in_criminal_proceedings-171-EW-en.do?clang=en&idSubpage=1&member=1#n12 (last visited on 26 June 2013). The relevant case law on judicial review of decisions not to prosecute is available online at http://www.cps.gov.uk/legal/a_to_c/appeals_judicial_review_of_prosecution_decisions/ (last visited on 26 June 2013).

unreasonable, it did not have the power to order the prosecution to go ahead. Rather, it could only order the prosecutor to review its decision in light of the court's findings.

However, after a recent Court of Appeal ruling an announcement has been made by the Director of Public Prosecutions (DPP) Keir Starmer that the Crown Prosecution Service is set to change its approach and allow victims to make an appeal in the case no charges are brought.¹⁷⁴ The ruling in question concerned the case of *R. v. Killick*, in which a man was convicted and jailed for three-and-a-half years for sexual assault after the CPS reversed its earlier decision in 2007 not to prosecute following numerous complaints and threats of judicial review.¹⁷⁵ The significance of the *Killick* case is that the Court of Appeal identified and gave effect to a victim's right to seek a review of a decision not to prosecute. It was decided that although the original decision not to prosecute was not unreasonable (hence, there would have been no ground for a reversal by the High Court), it was wrong and there was a realistic prospect of a conviction which was in the public interest. The Court of Appeal stated 'as a decision not to prosecute is in reality a final decision for a victim, there must be a right to seek review of such a decision'.¹⁷⁶

The Director of Public Prosecution, announcing that victims of crime will now have a right to a review of the decision not to prosecute, has also affirmed that such reviews should be available to all victims in line with Article 10 of the European Directive discussed above.¹⁷⁷ Although no guidance is available yet it appears that victims will be entitled to a review in every instance where the CPS decides not to bring charges without the requirement for any special circumstances to exist.

As such, victims need no longer meet the high standards required for a decision to be judicially reviewed, a right to a review is theirs automatically. As observed by Starmer:

[This change was] perhaps inevitable once it was recognised that victims are not mere observers in the criminal justice process, but real participants with both interests to protect and rights to enforce.¹⁷⁸

¹⁷⁴ BBC News UK, 'Victims to get right to challenge 'no charge' decisions', 27 July 2012, available online at <http://www.bbc.co.uk/news/uk-19008958> (last visited on 26 June 2013).

¹⁷⁵ England and Wales Court of Appeal, Criminal Division, *R. v. Killick*, [2011] EWCA Crim 1608, 29 June 2011.

¹⁷⁶ *Ibid.*, § 48.

¹⁷⁷ Directive 2012/29/EU, *supra* note no. 84.

¹⁷⁸ K. Starmer, 'Finality in Criminal Justice: When Should the CPS Reopen a Case?', 7 *Criminal Law Review* (2012) 526-534, at 534.

5.3 The Gradual Affirmation of Victims' Participatory Rights in Criminal Proceedings

As has already been discussed above, victim participation in criminal proceedings varies considerably between different criminal systems. In civil law systems, victims are generally accorded a relatively large role in criminal trials. If victims constitute themselves as *partie civile*, for instance, they acquire greater powers of intervention (often almost the same as those of the accused). Conversely, in criminal systems of common law jurisdictions, the recognition of an active role of the victim in the initiation of criminal proceedings (through the institution of private prosecution) is not reflected in the parallel recognition of rights once the trial has started; in those systems victims' participation is generally limited to that of witness.

Despite the intrinsic differences between these legal traditions, recent years have witnessed the progressive affirmation of victims' procedural rights in criminal proceedings, even in adversarial systems, under the influence of the emerging international standards analysed above. In particular, within adversarial systems, three main criticisms have developed in relation to the role afforded to victims in criminal trials.

The first criticism is that adversarial criminal proceedings instrumentalise victims, allowing them to participate only as witnesses. As William Pizzi has remarked, the adversarial system 'turns witnesses into weapons to be used against the other side'.¹⁷⁹ Indeed, victim-witnesses have no opportunity to tell their own story before the court, because their testimony is limited to answering questions that are carefully framed by the parties in order to emphasise the issues most relevant to their strategies.

The second criticism is related to a common misconception within common law systems, namely that the prosecutor will represent the interests of the victims.¹⁸⁰ This interpretation is mistaken because prosecutors are neither obligated nor empowered to act on behalf of victims. Indeed, in the adversarial trial, the prosecutor is not supposed to act as a legal representative of any witness since this would conflict with the duty to represent the public interest. This is explicitly indicated in the Code for Crown Prosecutors of England and Wales in the following terms:

¹⁷⁹ W. Pizzi, *Trials Without Truth* (New York: New York University Press, 1999), at 197.

¹⁸⁰ See e.g. J. De Hemptinne, 'Victims' Participation in International Proceedings', in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009) 562-564, at 563 (referring to the role of the prosecutor of the ad hoc Tribunals).

The CPS does not act directly on behalf of individual victims, or represent them in court in criminal proceedings because it has to take decisions reflecting the overall public interest rather than the interests of one person.¹⁸¹

The third criticism is related to the growing consensus that that is ‘intuitively strange’ to give victims the same *locus standi* as any other member of society.¹⁸² This view is similar to that of the longstanding view supported by criminal law purists according to whom ‘[t]he victim’s personal view should be no more relevant... that the personal view of any other individual’.¹⁸³

A review of recent legislative amendments adopted in systems of common law signal that victims’ voices are increasingly considered in the criminal process both at the trial phase and at the sentencing phase. Arguably, this phenomenon may be interpreted as an indication of the growing acknowledgment that victims’ interests should be protected and promoted in criminal proceedings.

5.3.1 *Victims’ Representation During the Trial Phase*

One significant area of legal development in relation to victims’ rights in criminal proceedings has been the issue of victims’ representation in the trial. Victims’ representation is an important means for ensuring the effective participation of victims in criminal proceedings. Indeed, victims’ representatives have an important role in protecting victims’ interests, for instance while they are cross-examined, as well as in making submissions to the court in relation to issues which may be relevant to victims (such as protective measures, forms of questioning and means for giving evidence, and offering practical support to victims). However, as seen above, victims’ representation has not traditionally been a feature of adversarial criminal trials, where only parties can make submissions to the court.

It is noteworthy that in recent years two common law jurisdictions, the US and Ireland, have established a system of court-based victim advocacy which entitles victims to make representations in criminal cases. In the United States, the legal foundation for a victims’ right legislation is generally attributed to the 1973 U.S. Supreme Court Decision in *Linda R.S. v. Richard D.*¹⁸⁴ In that case, the Supreme Court supported the then-prevailing view that a victim of crime cannot compel a criminal prosecution because ‘a private citizen

¹⁸¹ Crown Prosecution Service, Statement on the Treatment of Victims and Witnesses (1993), cited in J. Doak, *Victims’ Rights, Human Rights and Criminal Justice*, *supra* note no. 14, at 139.

¹⁸² M. Cavadino and J. Dignan, ‘Reparation, Retribution and Rights’, *supra* note no. 32, at 237.

¹⁸³ A. Ashworth and M. Redmayne, *The Criminal Process*, *supra* note no. 16, at 50 (‘The victim’s personal view should be no more relevant... than the personal view of any other individual.’)

¹⁸⁴ US Supreme Court, *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), 5 March 1973.

lacks a judicially cognizable interest in the prosecution or non-prosecution of another.’¹⁸⁵ Even though the *Linda R.S.* ruling was a clear representation of the victim exclusion in criminal trials, it also suggested a solution to that issue. The Court stated that Congress could ‘enact statutes creating victims’ rights, the invasion of which creates standing, even though no injury would exist without the statute.’¹⁸⁶

The first piece of federal crime victims’ legislation, the *Victim and Witness Protection Act*, was enacted in 1982. This act gave victims certain rights in federal trials, including the right to be consulted by the prosecutor as to the disposition of the case (relating to such issues as plea bargains, among others), but their representation in court was limited to providing impact statements at the sentencing stage.¹⁸⁷ Despite its limited scope, the *Victim and Witness Protection Act*, which followed the *Final Report* of President Reagan’s Task Force on Victims of Crime,¹⁸⁸ served as a springboard towards a more victim-centric approach to criminal justice. Since then, thirty-three states of the US have amended their constitution to address crime victims’ rights (through the so-called ‘victims right amendment’), and the remaining states have passed crime victims’ rights legislation.¹⁸⁹

A number of individual states have also adopted amendments to their constitutions and created a special office of the ‘victim advocate’ to enforce the provisions included in the amended constitutions. For instance, following a constitutional amendment, a victims’ service advocate has been added to the New Mexico Office of the Attorney General to provide assistance to victims of violent crimes and their families.¹⁹⁰ A number of states also provide for victims’ right to have a legal representative in court. Washington State, for example, provides that victims of violence and sex crimes have the right to have an advocate to assist them during prosecutorial or defence interviews and judicial proceedings.¹⁹¹ Illinois similarly establishes a constitutional right of the victims to have the presence of an advocate in court.¹⁹² However, in both cases, this right is limited to the presence of a lawyer, and not to victims’ involvement in the proceedings.

¹⁸⁵ *Ibid.*, at § 8.

¹⁸⁶ *Ibid.*, footnote 3.

¹⁸⁷ Victim and Witness Protection Act, Public Law No. 97-291, 96 Stat. 1248.

¹⁸⁸ President’s Task Force on Victims of Crime, Final Report, December 1982, available online at <http://www.ojp.usdoj.gov/ovc/publications/presdntstskforcrprt/front.pdf> (last visited on 26 June 2013).

¹⁸⁹ The full list of state constitutional amendments can be consulted online at <http://www.nvcap.org/states/stvras.html> (last visited on 26 June 2013).

¹⁹⁰ Constitution of New Mexico (as amended on 3 November 1992), Art. 2, section 24.

¹⁹¹ Washington Statute RCW 7.69.030, ‘Rights of victims, survivors, and witnesses’.

¹⁹² Constitution of Illinois, Art. 1, Section 8.1.9.

Other US states have taken a more progressive approach and have allowed victims to have attorneys to represent them at various stages of the proceedings, mostly during parole hearings, plea negotiations and sentencing. Certain states also permit victims' counsel to intervene in rape and sexual assault cases. Wisconsin, West Virginia and New Hampshire allow victims' representative to make representations to the court when questions governing the admissibility of sexual history evidence are considered.¹⁹³ In South Carolina victims' representatives are allowed to intervene anytime that the defence counsel refers to the victim's conduct as part of his defence.¹⁹⁴ Arguably, the growing number of state amendments reflects an emerging national consensus that victims belong inside the criminal justice process with a voice in decision-making.

Recently, calls for victims' legal representation in federal courts have increased. It is argued that without constitutional recognition of their rights, victims inevitably become second-class citizens with judges often giving automatic precedence to the claims of defendants rather than searching for reasonable alternatives that can accommodate the interests of both sides. A debate is currently being held in Congress regarding a constitutional amendment which, if ratified, would provide victims of violent crimes with constitutionally guaranteed rights. In particular, the Victims' Rights Amendment, as proposed in Congress provide for the rights of a crime victims to:

[F]airness, respect, and dignity ... to be heard at any release, plea, sentencing, or other such proceeding involving any right established by this article, to proceedings free from unreasonable delay, to reasonable notice of the release or escape of the accused, to due consideration of the crime victim's safety, and to restitution.¹⁹⁵

In order to assert and enforce such rights, the Amendment sets out that the victims' legal representative must have standing in court. At the moment of writing, debates are still ongoing in relation to the adoption of this Amendment.

Formal victims' legal representation is also provided for in Ireland. Like in most of the US schemes, the Irish system is only available to victims of rape and serious sexual offences. Recent legislation allows victims of these crimes to be represented by their own counsel where the defence seeks to introduce previous sexual history evidence.¹⁹⁶ Under these provisions, victims do not have to make a financial contribution to the cost of their legal

¹⁹³ J. Doak, *Victims' Rights, Human Rights and Criminal Justice*, *supra* note no. 14, at 141.

¹⁹⁴ South Carolina Statute 16-3-1510, section 3f(2).

¹⁹⁵ House Joint Resolution 106 (112th): Proposing an amendment to the Constitution of the United States to protect the rights of crime victims, 26 March 2012, section 1.

¹⁹⁶ Criminal Law (Rape) Act 1981, Section 4A(1), as inserted by Sex Offenders Act 2001, section 34.

representation; the Legal Aid Board will provide them with a lawyer to represent them free of charge.

It is worthwhile noting that the rights of victims in criminal proceedings are also being strengthened in systems where the enforcement of such rights has traditionally been rather weak. For instance, in the Netherlands, where a watered down version of the *partie civile* system is provided for in the criminal system, before the 1980s victims of crime were largely ignored.¹⁹⁷ However, from the 1980s onwards the lot of victims has significantly improved, through a series of legislative amendments which have improved the enforcement of victims' rights in criminal proceedings. For instance, the Victims' Status (Legal Proceedings) Act, which entered into effect on 1 January 2011, gives victims the right to the assistance of an interpreter and/or lawyer, to access the case file and, in certain circumstances, to present their views to the Court.¹⁹⁸

Victim standing in criminal proceedings remains, however, virtually non-existent in the United Kingdom, where victims have no right to be present at trial, no right to legal representation and no right to question witnesses nor present evidence. The idea of introducing some forms of formal representation of victims has been considered in the United Kingdom on a number of occasions since the mid-1980s,¹⁹⁹ but has always been rejected in view of the fact that it would constitute a substantial change to accepted procedures and that criminal proceedings are 'a substitute for vengeance not an expression of it'.²⁰⁰

It is therefore surprising that in 2005 the Government issued a consultation paper proposing a scheme for victims' representatives to assist relatives of homicide victims during the trial and at the sentencing stage.²⁰¹ Following this paper, a pilot scheme was established in 2006 at five Crown Court centres.²⁰² At the moment of writing it does not appear that this scheme will be rolled out nationally in the near future. However, under the pilot schemes victims of the selected centres can exercise some form of participation with the potential

¹⁹⁷ J. Van Dijk, 'Trends in Victim Policies in the Netherlands, 1980-2010', at 1, available online at http://fra.europa.eu/sites/default/files/fra_uploads/1563-budapest2011-JvanDijk.pdf (last visited on 26 June 2013).

¹⁹⁸ 'Netherlands: Improvement of Victims' Position in Criminal Procedure', available online at http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402512_text (last visited on 26 June 2013).

¹⁹⁹ For a review of these proposals, see J. Doak, *Victims' Rights, Human Rights and Criminal Justice*, *supra* note no. 14, at 144-147.

²⁰⁰ R.E. Auld, *A Review of the Criminal Courts of England and Wales* (UK, Ministry of Justice, 2001), Chapter XI, § 74 (in response to a suggestion from Victim Support that a victim's legal representative should be entitled to ask questions and to sit near the prosecution to assist in contradicting defence evidence), available online at <http://webarchive.nationalarchives.gov.uk/+/http://www.criminal-courts-review.org.uk/ccr-11.htm> (last visited on 26 June 2013).

²⁰¹ Department of Constitutional Affairs, *Hearing the Relatives of Murder and Manslaughter Victims*, 2005.

²⁰² The five centres are Birmingham, Cardiff, the Central Criminal Court, Manchester Crown Centre and Winchester.

effect of invigorating further discussion as to whether it would be possible to extend procedural rights to other victims. This is all the more relevant given the emerging international legal standards on victims' rights in criminal proceedings, which are likely to lead the United Kingdom to consider, in the coming years, how to actively involve victims in the trials. In particular, documents adopted in the context of the European Union, which are binding on the UK, and to which, as mentioned above, UK has already declared that it will adhere will necessarily require the state in question to abandon its traditional reluctance towards third parties in adversarial proceedings.

5.3.2 *Victims' Rights at the Sentencing Phase*

In recent years many jurisdictions have made provisions for victims to make known their views to the court at the sentencing stage. Usually, these views are known as 'victim impact statements' and their objective is to inform the court of the physical emotional or financial harm suffered as the result of an offence. Accordingly these statements allow the court to take a reasoned decision when deciding upon the appropriate sentence which also takes into account the suffering of the victims resulting from the crimes at issue. Victim impact statements are also an important tool from the victims' perspective as they provide victims with the opportunity to focus the court's attention on the human cost of the crime and to become a part of the criminal justice process.

Laws regarding victim impact statements vary from state to state. Generally, the person making the statement can discuss the harm suffered and all the consequences resulting from the crime, such as economic damages.²⁰³ In addition, the victim, or their relatives, can also discuss the impact of the crime on their ambitions or life plans, or on their family members.²⁰⁴ Some jurisdictions even allow victims to lay down specific penal demands.²⁰⁵ In

²⁰³ See e.g., Canadian Criminal Code, Art. 722(1); New Zealand, Victims' Rights Act 2002, section 17; South Australia, Criminal Law (Sentencing) Act 1988, section 7(A).

²⁰⁴ South Australia, Criminal Law (Sentencing) Act 1988, section 7(A); see also Attorney-General's Department, Government of South Australia, 'Victim Impact Statement: Information and Form', at 4: 'You may wish to comment about changes in lifestyle. For instance, how have your social commitments changed? How has the crime affected your employment? Have you had any changes in accommodation/education?', available online at http://www.voc.sa.gov.au/Publications/Victim_Impact_Statements/NewVISwebversionFONTS.pdf (last visited on 26 June 2013).

²⁰⁵ See e.g. Arizona Constitution, Article 2.1.4: 'To preserve and protect victims' rights to justice and due process, a victim of crime has a right: ... To be heard at any proceeding involving a post-arrest release decision, a negotiated plea, and sentencing.'; see also Arizona Revised Statutes, Criminal Code, Section 13-4426 (A): 'The victim may present evidence, information and opinions that concern the criminal offense, the defendant, the sentence or the need for restitution at any aggravation, mitigation, presentencing or sentencing proceeding.'

other jurisdictions, however, victims are expressly forbidden to put forward any proposal or suggestion on punishment or sentencing.²⁰⁶ This is primarily because the sentencing process is seen as the domain of the judge who considers a multitude of factors other than harm to victims, including public interest.

Most states allow either oral or written statements, or both, from the victim at the sentencing hearing, and require victim impact information to be included in the pre-sentence report, given to the judge prior to imposing sentence. In some states, victim impact statements are even allowed in bail hearings, pre-trial release hearings, plea bargain hearings and parole hearings.²⁰⁷ In cases of serious crimes, victims are generally allowed to present their statement in person before the court.²⁰⁸

The right to present victim impact statement is today recognised in a considerable number of states of common law origin where victims have not been traditionally granted any role in criminal proceedings. All fifty US states allow victim impact statement.²⁰⁹ Other countries of common law origin that allow victims to present an impact statement include United Kingdom, Canada, Ireland, New Zealand and South Australia.

²⁰⁶ For instance, the US Supreme Court found that victims cannot be allowed to recommend sentences in capital cases. See *Booth v. Maryland*, 482 U.S. 496, 15 June 1987, partly overruled by *Payne v. Tennessee*, 501 U.S. 808, 27 June 1991.

²⁰⁷ E.g., Canada Criminal Code, section 745.63; Code of Alabama, Title 15: Criminal Procedure, sections 15-23-71 and 15-23-75; Nebraska Constitution, Art. 1(28); New Zealand Victims' Rights Act, section 30.

²⁰⁸ Canada Criminal Code, section 722.2.1

²⁰⁹ D.E. Beloof, P.G. Cassel, and S.J. Twist, *Victims in Criminal Procedure*, *supra* note no. 5, at 567.

6 CONCLUDING REMARKS

Thirty years ago, the US criminologist W.F. McDonald described victims of crime as the forgotten men.²¹⁰ This Chapter has attempted to demonstrate that in the last few decades the role of victims and the rights they possess in criminal proceedings has considerably expanded. In particular, emerging trends in both international human rights law and domestic law suggest that victim participation is increasingly considered a desirable feature of the criminal process.

From the analysis undertaken in this Chapter it appears that the practice of human rights bodies and a number of legal instruments adopted at the international level, of both binding and non-binding nature, have begun to recognise that victims should be entitled to exercise a series of rights in criminal proceedings before domestic courts, especially in cases of gross human rights violations. Similarly, measures have been adopted in several domestic jurisdictions aimed at enhancing the protection of victims' interests in criminal proceedings.

It is argued that the process of gradual affirmation of victim's rights in criminal proceedings can be defined as a 'top-down' process in the sense that international norms and standards, as well as the practice of human rights treaty bodies, have influenced the adoption of correspondent norms at the domestic level. This influence has been the result of either the force of law (in the case of international treaties, or of binding decisions of human rights supervisory bodies), or through more diffuse mechanisms, such as that of reputation in international relations (in the case of soft law instruments, or of non-binding pronouncements of human rights bodies, such as those of the Human Rights Committee). The top-down character of this process is manifest, for instance, if we think of the recent introduction of a victim's right to a review of the decision not to prosecute in the UK. As observed above, this amendment was introduced following to the adoption of the EU Framework Decision on Victims of Crime demanding, *inter alia*, that victims be entitled to the review of a decision not to prosecute.

Although the primary driving force behind the affirmation of victim's rights in criminal proceedings has certainly been the adoption of international standards and norms on this matter, it is also true that these developments would not have been possible without

²¹⁰ W. F. McDonald, 'Toward a Bicentennial Revolution in Criminal Justice: The Return of the Victim', 13 *American Criminal Law Review* (1976) 649-673, at 650.

parallel debates and changes taking place at the domestic level increasingly demanding the protection of victim's interests in criminal trials.

Nevertheless, the affirmation of a victim's 'right to participation' in criminal proceedings remains, at present, extremely vague. Although international instruments now require the interests of victims to be taken into account in a variety of ways, such standards tend to eschew stipulating specific requirements concerning the role they ought to play in criminal proceedings.

The preceding sections have argued that, because of the intrinsic differences between the various criminal law systems international instruments on victims' rights have not laid down explicit requirements on victims' participation in criminal proceedings. Most of these instruments are formulated in a vague or non-prescriptive manner. Neither do these instruments detail how victims' rights are to be realised in practice, nor in what stage of the process they are to be applied. Rather, they tend to centre around the idea that some mechanisms have to be set up to allow the views and concerns of victims to be heard - none require victims to be considered parties to the proceedings. Similarly, pronouncements by human rights supervisory bodies have refrained from recognising that victims shall be granted a specific set of participatory rights in criminal proceedings.

Therefore, in light of the analysis carried in this Chapter, it is not possible to determine that a set of procedural rights is attached to victims' right to justice, as elaborated in Chapter III. However, the fact that a victim's participation is enshrined as a value in a number of international documents and decisions, and given the progressive introduction of victims' participatory rights in domestic criminal systems (particularly in case of serious crimes), there is undoubtedly increasing acceptance of the need to take into account victims' views and concerns. Furthermore, such developments acknowledge that, at the very least, victims have legitimate interests in the outcome of the proceedings. Victim participation is seen today not only as helpful to rehabilitation of victims but also as capable of enhancing the legitimacy of criminal trials. This position reflects the emerging view that criminal justice should not only be conceptualised as a measure of general human rights protection but also as a remedial measure for victims, as indicated in Chapter III.

In the longer term, it is equally conceivable that some form of participation in criminal proceedings may be affirmed as an international legal standard. This is so for three main reasons. First, the growing affirmation at the international level of documents viewing victims participation as a desirable value may lead, in time, to a point of consensus; this is even more true if we consider that some of the international instruments affirming victims' participatory

rights in criminal proceedings are binding on states parties, such as the Framework Decisions adopted by the European Union.²¹¹ Second, the brief review of domestic practices outlined in this Chapter supports the view that victim participation is emerging as a desirable value even in those systems where victims have not traditionally been granted any right in criminal proceedings. Finally, the current approach of human rights supervisory bodies is inconsistent with their practice affirming a right to justice as a component of the right to remedy for victims of gross violations of human rights. Whereas these bodies have argued that victim may have a right to see those responsible for the violation are prosecuted and punished, they have not recognised victims corresponding procedural rights in the criminal process. Arguably, this may raise an issue under the provisions on the right to remedy, as discussed in Chapter III.²¹²

In short, what we can therefore observe in relation to victims' rights in criminal proceedings is a clear trend towards their realisation. Just as international and human rights standards have acted to elevate the position of the victim, so too domestic systems seems to be responding, albeit slowly. However, as stated above, even on the domestic level there has been a growing recognition that the outright exclusion of victims is unlikely to be sustainable in the longer term. Although at present the extent to which the adversarial paradigm can effectively accommodate victims rights remains inherently limited, due to the predominantly bipolar structure of adversarial trials, there is a movement signalling that the private interests of victims should be considered together with public interest in criminal trials. Most importantly, the practice indicates that it is possible and indeed necessary to ensure effective enforcement of the right to justice.

It remains to be seen whether in the coming years these emerging legal standards will be translated into participatory rights. In this respect, as will be illustrated in the next chapter, the practice of international and internationalized criminal tribunals is significant because it illustrates that it is possible to include victim participation in largely adversarial procedures without infringing the rights of the accused and the efficiency of the trials. Moreover, in affirming that international courts must balance the interests of the accused, not only with those of the prosecution but also with those of the victim, the message has been sent to other *fora*, including domestic criminal courts, to adopt new procedures that depart from progressively out-dated theories on the nature of criminal offences and the objectives of criminal trials.

²¹¹ E.g., *Council Framework Decision 2001/220/JHA*, *supra* note no. 80.

²¹² S. Trechsel, *Human Rights in Criminal Proceedings*, *supra* note no. 96, at 37.

Chapter VI

Victims' Right to Justice before International and Internationalized Criminal Tribunals

1 INTRODUCTION

The idea of contributing to 'justice for victims' is now commonly cited as a driving force for the role of international criminal tribunals.¹ For their part, international criminal justice institutions have also often referred to the pursuit of justice for victims as their prime objective. In opening the prosecutor's case in the *Katanga* case, the Deputy Prosecutor of the International Criminal Court ('ICC') declared: 'Our mandate is justice, justice for the victims: the victims of Bogoro; the victims of crimes in Ituri; and the victims in the DRC.'²

Most importantly for our purposes, however, is the fact that recently established international and internationalized criminal tribunals including the ICC, the Extraordinary Chambers in the Courts of Cambodia ('ECCC') and the Special Tribunal for Lebanon ('STL') have introduced procedures aimed at providing redress to victims of crimes within their jurisdiction. Although

¹ In recent years, a vast literature has explored the role of international criminal tribunals from the perspective of victims. Monographs on the topic include: M. Heikkilä, *International Criminal Tribunals and Victims of Crime: A Study of the Status of Victims before International Criminal Tribunals and of Factors affecting this Status* (Turku, Åbo: Institute for Human Rights, Åbo Akademi University, 2004); T.M. Funk, *Victims' Rights and Advocacy at the International Criminal Court* (Oxford, New York: Oxford University Press, 2010); B. McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Cambridge: Intersentia, 2011); C. McCarthy, *Reparations and Victim Support in the International Criminal Court* (Cambridge: Cambridge University Press, 2012); and J.C. Ochoa S., *The Rights of Victims in Criminal Justice Proceedings for Serious Human Rights Violations* (Leiden: Martinus Nijhoff Publishers, 2013). A large number of scholarly papers have also been published on the topic. The most recent ones include: H. Olásolo, 'Victims' Participation According to the Jurisprudence of the International Criminal Court', in Idem, *Essays on International Criminal Justice* (Oxford: Hart, 2012); C. Van Den Wyngaert, 'Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge' 44 *Case Western Reserve University School of Law* (2012) 475-496; L. Catani, 'Victim Participation at the International Criminal Court: Some Lessons Learned from the Lubanga Case', 10 *Journal of International Criminal Justice* ('JICJ') (2012) 905-922. See also the contributions to the victims' symposia in 8 *JICJ* (2010), at 75 ff, and 91 *International Review of the Red Cross* (2009), at 215 ff.

² 'ICC Cases an Opportunity for Communities in Ituri to Come Together and Move Forward', Press Release, 27 June 2008, IDD-OTP-20080627-PR332, available at [http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/press%20releases%20\(2008\)/Pages/icc%20cases%20an%20opportunity%20for%20communities%20in%20ituri%20to%20come%20together%20and%20move%20forward.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/press%20releases%20(2008)/Pages/icc%20cases%20an%20opportunity%20for%20communities%20in%20ituri%20to%20come%20together%20and%20move%20forward.aspx). Following the decision to stay the proceedings in the Lubanga case, the ICC Prosecutor declared: 'There will be justice for Lubanga's victims', see 'ICC - The Office of the Prosecutor supports the need for a fair trial and promises justice will be done for Lubanga's victims', Press Release, 24 June 2008, ICC-CPI-20080624-PR329, available at [http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/press%20releases%20\(2008\)/Pages/the%20office%20of%20the%20prosecutor%20supports%20the%20need%20for%20a%20fair%20trial%20and%20promises%20jus.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/press%20releases%20(2008)/Pages/the%20office%20of%20the%20prosecutor%20supports%20the%20need%20for%20a%20fair%20trial%20and%20promises%20jus.aspx) (both last visited on 26 June 2013).

they provide for such redress through different procedural mechanisms, these courts enable victims to participate in their own right in proceedings against the alleged perpetrators of the crimes from which they have suffered.³ The ICC and the ECCC may also award reparation to the victims of international crimes.⁴

Although central to the current international criminal justice discourse, the idea of bringing justice to victims was not of central concern to international criminal law at the initial stages of its development. Instead, international criminal law developed at a time when the position of individuals within the classical framework of international law was very limited.⁵ Historically, questions of redress for victims have not been dealt with in the context of international criminal law where victims have traditionally played a very limited role. On the whole, international criminal justice has been primarily concerned with the criminal responsibility of individual perpetrators, their prosecution and punishment.

The recognition of victims' rights before recently established international criminal tribunals is not an isolated phenomenon. It is, in fact, in keeping with significant developments in the last few decades, mainly in international human rights law, regarding redress for victims of serious violations of human rights. As we have seen in the preceding chapters, a number of international legal institutions and regimes have provided a context within which victim redress has been addressed. International rules relating to the treatment of aliens, international humanitarian law and international human rights law have all dealt with questions of redress, as have the rules on state responsibility. In particular, while affirming the existence of an individual right to remedy, it has been observed in Chapters I and III that a substantial amount of international legal instruments and practice have challenged the traditional categories of restitution and monetary compensation as adequate remedies in cases of gross human rights breaches. Instead, these legal instruments have affirmed that 'the accountability of individual perpetrators of grave human rights violations is one of the central elements of any effective remedy for victims of human rights violations.'⁶ In other words, in cases of gross violations of human rights the relevant rules on redress have been interpreted as entailing a right to justice, understood as the right to have those allegedly responsible for the violation prosecuted.

³ See Art. 68(3) ICC Statute ('ICCSt. '); Art. 17 STL Statute ('STLSt. '); Rule 23 ECCC Internal Rules (ECCC IR).

⁴ Art. 75 ICCSt. ; Rule 23(11) ECCC IRs.

⁵ See *supra* Chapter I, Section 2.1.

⁶ UN General Assembly ('UN GA'), *Khmer Rouge Trials*, UN Doc. A/Res/57/228, 27 February 2003.

In light of the above, it may be advanced that the incorporation of a regime of victim redress within the framework of international criminal tribunals does not represent an extension of international criminal justice's mandate, but rather confirms a shift in the way in which redress is conceptualised. The procedure of international criminal trials – originally based on the 'duel' between the prosecution and the defence – has been adapted with the aim of taking into account the affirmation of a victims' right to justice in cases of gross violations of human rights. This has meant that, in addition to the criminal accountability of wrongdoers, the need to incorporate victims' voices in the criminal process through some form of participation has emerged as a component of the courts' mandate.

This Chapter therefore critically examines whether the creation of a regime of redress for victims within international and internationalized criminal tribunals is consistent with the principle of a right to justice as has emerged under international law for victims of gross human rights violations. In order to test such a hypothesis two elements will be considered: (i) the character of victims' participation and its legal rationale; and (ii) the implementation of the victims' participation schemes by international and internationalized criminal tribunals. Before doing that, however, it appears necessary to analyse, however briefly, the traditional position of victims in international criminal law and the main characters of the regimes of victims' participation adopted within recently established international and internationalized criminal tribunals.

2 THE TRADITIONAL POSITION OF VICTIMS IN INTERNATIONAL CRIMINAL LAW

2.1 The Role of Victims in the Nuremberg and Tokyo Military Tribunals

The traditional limited legal status of victims of violations of international crimes, discussed in Chapter I, was reflected in the proceedings of international military tribunals established in the aftermath of World War II with the aim of prosecuting and punishing German and Japanese war criminals, the International Military Tribunal (IMT, or Nuremberg Tribunal) and the International Military Tribunal for the Far East (IMTFE, or Tokyo Tribunal).

Victims were largely excluded from the proceedings carried out by the IMT as a result of the mainly adversarial procedure it adopted. Victims were only allowed to participate in criminal trials as witnesses and it is reported that the idea of including victims as civil parties was not even advanced by those civil law states present.⁷ Similarly, the IMTFE adopted a largely adversarial approach and as such no provision for victim participation other than as witnesses was made.⁸ Therefore, even though the establishment of the international military tribunals certainly marked a significant achievement in the development of international criminal law, they did not provide an appropriate forum for victims of the crimes under their jurisdiction.

A further reason victims played a minor role before the IMT is that most cases before the Nuremberg Tribunal were conducted almost entirely on the basis of documentary evidence. Stover reports that Justice Jackson, the chief United States prosecutor at the Nuremberg Trials, favoured documentary evidence instead of eyewitness and survivor testimony because he was convinced that this strategy would demonstrate the vast scale of the crime and the bureaucracy that enabled them.⁹ In a report to President Truman of June 1945, Jackson wrote '[w]e must establish incredible events by credible evidence'.¹⁰ Jackson feared that victims' testimony could be viewed as too heinous to believe and also feared that some victims could undermine the prosecutor's case if they discussed the cooperation that some Jews gave to the Nazi administration. For this reason, Jackson focused mostly on the actions of the defendants and on the criminality of the Nazi system rather than on the suffering of victims. Consequently the prosecution only called 94 witnesses to testify, most of whom were

⁷ B. McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Cambridge: Intersentia, 2011), at 135.

⁸ *Ibid.*

⁹ E. Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (Philadelphia: University of Pennsylvania Press, 2005), at 19.

¹⁰ R.H. Jackson, *The Nürnberg Case* (New York: Knopf, 1947), at 10.

former SS members, camp guards and Nazi party members.¹¹ And indeed, even those victims who did appear before the Tribunal for the prosecution were not called to testify about individual instances of war crimes. Rather, they were called on to speak to the ‘collective, systematic, and bureaucratic activities of massive and complex organizations that executed criminal policies from the highest levels of government.’¹² In contrast to the Nuremberg experience, the IMTFE was unable to rely on a large amount of documentary evidence since the Japanese had destroyed most of their military records before surrendering. As such the IMTFE was forced into relying on a greater number of victim-witnesses.¹³

Further, the selection of victims to testify as witnesses did not necessarily reflect the realities of the crimes committed. The Nuremberg trial mainly focused on the question of whether the defendants took part in a conspiracy to wage aggressive war against various European states rather than on the crimes committed against the civilian population. Moreover, it has been noted that despite the wide occurrence of gender crimes in both Nazi and Japanese controlled areas, victims of rape were not called to testify before the respective courts.¹⁴

Finally, in relation to the issue of redress for victims, although the Nuremberg Tribunal had the power to order fines and forfeitures which could have been used to contribute to redressing the harm suffered by victims, no such order was made.¹⁵ Neither the IMT nor the military tribunals operating under Control Council 10 or under the Royal Warrant of 1946 were given the power to award compensation to victims. For most victims, if they received reparation, it was necessary to take part in a long process of domestic litigation before they were able to obtain compensation in respect, for example, of their treatment as slave labourers or forced deportees.¹⁶ Considering the position of victims in the trials following the second world war, Prosecutor Ferencz observed that ‘[t]rials under the auspices

¹¹ M.C. Bassiouni, *Introduction to International Criminal Law* (Ardsley, NY: Transnational Publishers, 2003), at 411.

¹² D. Cohen, ‘Beyond Nuremberg: Individual Responsibility for War Crimes’, in C. Hesse and R. Post (eds), *Human Rights in Political Transitions: Gettysburg to Bosnia* (New York: Zone Books, 1999), cited in E. Stover, *The Witnesses*, supra note no. 9, at 19.

¹³ B. McGonigle, *Procedural Justice?*, supra note no. 7, at 136.

¹⁴ H. Nicola, ‘Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence’, 3 *International Journal of Transitional Justice* (2009) 114-134, at 115.

¹⁵ C. McCarthy, *Reparations and Victim Support in the International Criminal Court*, supra note no. 1, at 44-45.

¹⁶ E.g., Italian Court of Cassation (Sezioni Unite civili), *Ferrini c. Repubblica Federale di Germania*, Decision No. 5044/2004, 11 March 2004, reprinted in 87 *Rivista di diritto internazionale* (2004) 539-551; Greek Supreme Court (Areios Pagos), *Prefecture of Voiotia v. Federal Republic of Germany*, case No. 11/2000, 4 May 2000, reprinted in 129 *International Law Reports* (2007) 513-524. But see International Court of Justice, *Jurisdictional Immunities of the State* (Germany v. Italy: Greece Intervening), (not yet reported), 3 February 2012.

of the Allied armies were an entity unto themselves. They played no significant role in the lives of the victims. The survivors were not even in the audience.’¹⁷

2.2 The Role of Victims in the International Criminal Tribunals for the former Yugoslavia and Rwanda

In the decades following WWII, and in particular since the 1980s, increasing attention has been paid to the interests of victims in national criminal justice. However, in practice this has had limited impact on international criminal justice procedure, at least initially. Like the Nuremberg and Tokyo military tribunals, the ad hoc Tribunals established in the early 1990s, the International Criminal Tribunal for the former Yugoslavia (‘ICTY’) and the International Criminal Tribunal for Rwanda (‘ICTR’), adopted a largely adversarial procedural approach.¹⁸

Neither the Statute nor the Rules of Procedure and Evidence of the ICTY or ICTR provide for the participation of victims in the proceedings other than as witnesses. Notably, a proposal for the appointment of separate counsel for victims was submitted during the negotiations for the ICTY Statute and later rejected for three main reasons.¹⁹ First, it was believed that the victims’ interests would be adequately represented by the prosecutor who was entrusted with the mandate of representing the interests of the international community in ensuring the prosecution and punishment of the perpetrators.²⁰ This was later reaffirmed in the case law: ‘[T]he Prosecutor acts on behalf of and in the interest of the community, including the interests of the victims of the offence charged’.²¹

Secondly, it was feared that the participation of victims as third party to the proceedings could possibly interfere with prosecutorial strategy and eventually jeopardise the

¹⁷ Cited in Y. Danieli, ‘Reappraising the Nuremberg Trials and Their Legacy: The Role of Victims in International Law’ 27 *Cardozo Law Review* (2006) 1633-1649, at 1642.

¹⁸ A. Orie, ‘Accusatorial v. Inquisitorial in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings before the ICC’, in A. Cassese, P. Gaeta, and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 2 (Oxford: Oxford University Press, 2002), 1439-1495.

¹⁹ V. Tochilovsky, ‘Victims’ Procedural Rights at Trial: Approach of Continental Europe and the International Criminal Tribunal for the Former Yugoslavia’, in J.J.M. Van Dijk, R.G.H. van Kaam and J.M. Wemmers (eds), *Caring for Crime Victims: Selected Proceedings of the 9th International Symposium on Victimology* (city: Criminal Justice Press, 1999) XX-XX, at 287-289.

²⁰ V. Morris and M.P. Sharf, *An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia*, vol. 1, (Ardsley, NY: Transnational Publishers, 1995), at 167. For a critical appraisal of the representation of victims’ concerns by the ICTY prosecutor, see e.g. M.-B. Dembour and E. Haslam, ‘Silencing Hearings? Victim-Witnesses at War Crimes Trials’, 15 *European Journal of International Law* (2004) 151-177.

²¹ ICTY, Decision on Prosecutor’s Appeal on Admissibility of Evidence, *Aleksovski* (IT-95-14/1-A), Appeals Chamber (‘AC’), 16 February 1999, § 25.

interests of the international community.²² Lastly, the drafters of these tribunals' legal framework were reluctant to set out victim participatory rights because the introduction of a third party in a predominantly adversarial procedure was considered incompatible with the basic principle of equality of arms between the prosecution and the defence, which could equally be seen as jeopardising the fair trial rights of the accused.²³

As such, despite the developments occurring in the meantime in relation to the rights of victims in domestic criminal proceedings,²⁴ no independent role in the proceedings was assigned to those harmed by the crimes under the scrutiny of the ad hoc Tribunals, other than witnesses. Due to the procedural approach adopted, victims' testimony has been generally controlled by the questions asked by the parties. In other words, victims have not been provided an opportunity to tell their stories in a narrative form. The fact that victims have not being allowed to tell their stories, coupled with the tendency of judges to interrupt victims when their testimony deviates from the purpose of assessing the guilt or innocence of the accused,²⁵ prompted many criticisms from victims' groups which began to campaign for greater victim acknowledgment, rights and representation in international courts established subsequently.

Nonetheless, in a number of ways the ad hoc Tribunals paved the way for the inclusion of victims in the narrative and, most importantly, in the procedure of international criminal justice. In May 1997, in a lecture delivered to the British Institute of Human Rights, the then ICTY President Antonio Cassese emphasised the difference between the ICTY and the precedents of Nuremberg and Tokyo in respect to victims of crimes:

[I]t can be truly said of the Tribunal that it was essentially set up for the victims of crimes, i.e. the individual rape or torture victim or the relative of a murder victim, whereas the Nuremberg Tribunal was created primarily to try Axis war criminals for the crimes committed against the Allied Nations and their nationals.²⁶

And he further underlined:

To protect victims is the very "raison d'être" of the ICTY, which was established to halt and redress the crimes being committed against defenceless persons. Among the various enforcement mechanisms of human rights, an

²² V. Morris and M.P. Sharf, *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia*, *supra* note no. 20, at 167.

²³ C. Jorda and J. de Hemptinne, 'The Status and the Role of Victims', in A. Cassese, P. Gaeta, and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 2 (Oxford: Oxford University Press, 2002) 1387-1419, at 1393.

²⁴ See *supra* Chapter V, Section V.

²⁵ M.-B. Dembour and E. Haslam, 'Silencing Hearings?', *supra* note no. 20.

²⁶ A. Cassese, 'The International Criminal Tribunal for the former Yugoslavia and Human Rights', lecture delivered to the British Institute of Human Rights on 1 May 1997, published in 4 *European Human Rights Law Review* (1997) 329-352, at 330.

international criminal tribunal is undoubtedly the most directly effective and radical, because it aims at prosecuting and punishing the very authors of serious offences against human dignity.²⁷

A dedicated unit with the mandate of assisting victims and witnesses, and a body of case law particularly attentive to the protection and support of the most vulnerable categories of victims²⁸ undoubtedly indicated that the ad hoc Tribunals had a more victim-oriented attitude than the post-WWII tribunals.

Moreover, at least in principle, victims have been entitled to two forms of participations in the criminal process, other than as witnesses. The first is through *amicus curiae* submissions. Rule 74 of the ICTY and ICTR RPEs establishes that '[a] Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to appear before it and make submissions on any issue specified by the Chamber.' In theory, this provisions offers an opportunity to victims to participate in the proceedings. In at least two occasions those acting on behalf of victims' interests sought to intervene in the proceedings through the *amicus curiae* provisions. For instance, in the *Bagosora* case before the ICTR, the Belgian government requested to intervene as amicus on '[t]he right of Belgians or their rightful claimants ... to appear before the Tribunal as plaintiffs and not as mere witnesses'.²⁹ Similarly, the Rwandan government sought to intervene in order to help prove the guilt of the accused and seek damages for the unlawful taking of property.³⁰ However, the Tribunal rejected both requests,³¹ indicating perhaps that whilst victims' participation through *amicus curiae* provisions is not prohibited, the judges were nevertheless reluctant to turn victims and those acting on their behalf into plaintiffs. In another case, a women's rights group representing the interests of victims requested to submit an *amicus* brief in seeking to amend the charges against the accused so as to include charges of sexual violence. The Tribunal, however, rejected the request, finding that the role to prosecute belongs to the prosecutor only, and not to the Chamber nor to *amici*.³²

²⁷ *Ibid.*, at 331.

²⁸ See e.g. Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, *Tadić* (IT-94-1-T), Trial Chamber ('TC'), 10 August 1995; Decision on the Application of the Prosecutor Dated 17 October 1996 Requesting Protective Measures for Victims and Witnesses, *Blaškić* (IT-95-14-T), TC, 5 November 1996; Judgment, *Delalić et al.* (IT-96-21-T), TC, 16 November 1998, §§ 49-59.

²⁹ ICTR, Decision on the Amicus Curiae Application by the Government of the Kingdom of Belgium, *Bagosora et al.* (ICTR-96-7-T), TC II, 6 June 1998, at 2.

³⁰ ICTR, Decision on the Amicus Curiae Request by the Rwandan Government, *Bagosora et al.* (ICTR-98-41-T), TC II, 13 October 2004.

³¹ ICTR, Decision on the Amicus Curiae Application by the Government of the Kingdom of Belgium, *supra* note no. 29, at 2-3; Decision on the Amicus Curiae Request by the Rwandan Government, *supra* note no. 30.

³² ICTR, Decision on the Application to File an Amicus Curiae Brief According to Rule 74 of the Rules of Procedure and Evidence Filed on Behalf of the NGO Coalition for Women's Human Rights in Conflict Situations, *Ntagerura et al.* (ICTR-99-46-T), TC III, 24 May 2001.

Another opportunity for the victims to have their voice heard in the proceedings of ad hoc Tribunals is through victim impact statements. Although the right to submit victim impact statements is not foreseen in the statute or rules of the ad hoc Tribunals, both the ICTY and ICTR have allowed, for the purposes of sentencing, the submission of victim impact statements provided by the prosecution.³³ In addition, pursuant to Rule 92*bis*, the Prosecution may submit written statements by witnesses that concern the impact of crimes upon witnesses. Victims have also occasionally been called to testify about the impact of crimes on their lives.³⁴

Finally, even if victims cannot be awarded reparation by the ad hoc Tribunals, the ICTY and ICTR Statutes provide that '[i]n addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct.'³⁵ Moreover, the ad hoc Tribunals RPEs stipulate that, in case of conviction of the accused, national courts competent to award compensation to victims are bound to the findings of the ad hoc tribunals as to the criminal liability of the convicted person.³⁶ However, national courts in the former Yugoslavia or Rwanda have been unable to deal with these cases. Moreover, neither the ICTY nor the ICTR have ever put into effect the restitution provisions.³⁷

In reaction to this failure, in 2000, by request of the Office of the Prosecutor, the proposal of entrusting the Tribunal with the mandate of awarding compensation to victims was considered by the ICTY judges.³⁸ Although supporting the proposal in principle, the Judges rejected it in view of the many problems that the incorporation of victim's participation and compensation in the Statute and Rules would raise. In particular, the Judges noted the impact of victims' rights on the workload of the Tribunal, on the effectiveness of the prosecutor's work, the length of proceedings and, eventually, on the rights of the defendant.³⁹ Similarly, the ICTR Judges rejected proposals to amend the Statute so as to include victims' right to redress.⁴⁰

³³ Several judgments of the ICTY and the ICTR cited victims' impact statements submitted by the prosecution: see e.g., ICTY, Judgment, *Mucić et al.* (IT-96-21), TC, 16 November 1998, § 1263; Sentencing Judgment, *Tadić* (IT-94-1), TC II, 11 November 1999, § 4.

³⁴ E.g., Sentencing Judgment, *Nikolić* (IT-94-2-S), TC II, 18 December 2003, §§ 41-43.

³⁵ See Articles 24(1) and 23(1) of the ICTY and ICTR Statutes respectively.

³⁶ Rule 106 ICTY and ICTR Rules of Procedure and Evidence ('RPE').

³⁷ On the implementation of the ad hoc Tribunals redress provisions, see I. Bottiglieri, *Redress for Victims of Crimes under International Law* (Leiden: Martinus Nijhoff Publishers, 2004) at 202-209.

³⁸ See ICTY, *Victims' Compensation and Participation*, Appendix to UN Doc. S/2000/1063, Judges' Report of 13 September 2000.

³⁹ *Ibid.*, §§ 23-41.

⁴⁰ ICTR, *Letter of the President of the ICTR to the Secretary-General of the United Nations, annex to Letter of 14 December 2000 from the Secretary-General Addressed to President of the Security Council*, UN Doc. S/2000/1198 (2000).

All in all, it is evident from the legal context in which international criminal justice developed that it was not traditionally conceived as a means of providing justice for victims. It was only with the negotiations of the Rome Statute for an International Criminal Court which culminated in 1998 that the first steps made by the ad hoc Tribunals would result in a ‘Copernican revolution’ in international criminal procedure. While Security Council Resolution 827 explained that the ICTY was established ‘for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law’,⁴¹ Kofi Annan (then UN Secretary General) stated at the inaugural meeting of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court that ‘the overriding interest must be that of the victims, and of the international community as a whole ... It [the Court] must be an instrument of justice, not expediency. It must be able to protect the weak from the strong’.⁴²

This was not a revolution in words only. As will be illustrated in the following sections, the ICC, and other internationalized criminal tribunals established in the same period, substantially changed the law and procedure of international criminal justice in relation to victims.

⁴¹ UN Security Council (‘UN SC’), Resolution 827, UN Doc. S/RES/827 (1993), 25 May 1993, § 2.

⁴² UN Press Release, ‘UN Secretary General Declares Overriding Interest of International Criminal Court Conference Must Be that of Victims and World Community as a Whole’ (SG/SM/6597 L/2871), 15 June 1998, available online at <http://www.un.org/News/Press/docs/1998/19980615.sgsm6597.html> (last visited on 26 June 2013).

3 VICTIMS' RIGHTS AT THE ICC

The Rome Statute of the International Criminal Court is the first international treaty that sets out victims' rights in international criminal proceedings. As observed above, the inclusion of victims' rights in the procedure of the ICC originated from the progressive affirmation of victims' rights at the international level as well as from the dissatisfaction towards the experience of the ad hoc Tribunals which in many ways ignored victims' needs and concerns.⁴³ When the negotiations for the Rome Statute of the ICC started, it was widely thought that not recognising victims' rights would have amounted to an unsustainable position. Former Secretary General Kofi Annan, described victims' concerns as the 'overriding interest' that should drive the Rome Conference,⁴⁴ and many delegates heeded his call. The decision to include victims' rights in the ICC procedural system, particularly the right to participate in the proceedings and to claim reparation for the harm allegedly suffered was strongly supported by civil society including a number of influential academic circles, NGOs and some powerful national delegations.⁴⁵

Fernández de Gurmendi, who took part in the Working Group for the Rules of Procedure and Evidence relating to Part 4 of the Statute, observed that 'the crafting of the regime on victims was probably the most challenging task undertaken by the Preparatory Commission',⁴⁶ in view of the different legal traditions which the delegates came from. As a result, the ICC Statute and Rules adopt a hybrid system that draws on both civil and common law traditions.⁴⁷ As will be illustrated further below, victims' rights were conceived in such a way as not to jeopardise the primary function of the Court, that is to prosecute perpetrators of international crimes and the fairness of the trials.

With the establishment of the Court, the promise was made that victims would no longer be anonymous silent faces in the background of international trials; they would be

⁴³ L. Walley, 'Victimes et témoins de crimes internationaux: du droit à une protection au droit à la parole', 84 *International Review of the Red Cross* (2002) 51-77.

⁴⁴ United Nations Press Release, 'UN Secretary General Declares Overriding Interest of International Criminal Court Conference must be that of Victims and World Community as a Whole', 15 June 1998, available at <http://www.un.org/icc/pressrel/lrom6r1.htm> (last visited on 26 June 2013).

⁴⁵ S. Zappalà, 'The Rights of Victims v. the Rights of the Accused', 8 *JICJ* (2010) 137-164, at 159.

⁴⁶ S. Fernández de Gurmendi, 'Elaboration of the Rules of Procedure and Evidence', in R.S. Lee et al. (eds) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley, NY: Transnational Publishers, 2001), 235-257, at 256. See also C. Kress, 'The Procedural Law of the International Criminal Court in Outline: Anatomy of Unique Compromises', 1 *JICJ* (2003) 603-617.

⁴⁷ M. Caianiello, G. Illuminati, 'From the International Criminal Tribunal for the former Yugoslavia to the International Criminal Court', 26 *North Carolina Journal of International Law and Commercial Regulation* (2000-2001) 407-455; J. Jackson, 'Finding the Best Epistemic Fit for International Criminal Tribunals: Beyond the Adversarial-Inquisitorial Dichotomy', 7 *JICJ* (2009) 17-39; A. Orie, 'Accusatorial v. Inquisitorial Approach', *supra* note no. 18, at 1475-1491.

entitled to rights including participation in the proceedings and reparation for the harm suffered.

3.1 The Right to Participation in the Proceedings

The victim participation scheme set out in the ICC Statute and RPE is probably one of the most innovative features of the ICC legal framework. This scheme is completely unprecedented in the world of international criminal justice; indeed, as seen above, traditionally victims had only been allowed to interact with the courts as witnesses called on to serve the evidentiary needs of a party in a given case. Conversely, the ICC Statute and Rules fully acknowledge the role of victim in the criminal process, providing for victim participation at each stage of the proceedings, at all stages of the trial process. Other than as witnesses, victims can participate in criminal trials in two ways: victims may (i) submit complaints about an offence to the Court; (ii) participate in the proceedings, including for the purposes of seeking reparation following the conviction of the accused.

3.1.1 Victim Complainant

Victims, like other individuals and organizations, may submit communications to the Office of the Prosecutor regarding potential cases falling within the Court's jurisdiction.⁴⁸ The prosecutor is then obligated to evaluate the materials received. Based on these complaints, the prosecutor may also decide to seek authorisation from the Pre-Trial Chamber for the commencement of an investigation.⁴⁹ Although the right to submit a communication is not a specific right of victims, but rather is available to all individuals, it is remarkable that the Court characterises this possibility as the first instance in which victims can be involved in the proceedings before the Court.⁵⁰

⁴⁸ Art. 15, ICCSt. By the end of 2012, the Office of the Prosecutor had considered a total of 9,717 "communications" received pursuant to Article 15 of the Statute, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/Pages/communications%20and%20referrals.aspx#1 (last visited on 26 June 2013).

⁴⁹ Art. 15(3), ICCSt.

⁵⁰ See Assembly of State Parties, *Report of the Court on the Strategy in Relation to Victims*, ICC-ASP/8/45, 18-26 November 2009, at 2, 4.

3.1.2 *Victim Participant*

The provisions addressing the role of victims in ICC proceedings can be classified according to the stage of the proceedings in which they are applicable. A preliminary distinction may hence be made between participation under Part II and Part VI of the Statute, devoted respectively to ‘Jurisdiction, Admissibility and Applicable Law’, and to ‘The Trial’.

Under Part II of the Statute, two provisions potentially enable victims to have access in circumstances which are identified as particularly important to their interests. First, pursuant to Article 15(3), victims ‘may make representations to the Pre-Trial Chamber’ in the event the Prosecutor decides to initiate investigations *proprio motu* (Article 15(3)). Second, victims may ‘submit observations to the Court’ when challenges are made as to the jurisdiction of the Court or the admissibility of a case (Article 19(3)).⁵¹ The wording used by the two provisions indicates that the possibility for victims to intervene in these specific circumstances is not a right; rather, it remains a faculty under the control of the judges which, as such, may be limited, if not revoked, where it is found to prejudice other impending objectives. The Rules of Procedure and Evidence also empower the chambers to seek the views of the victims ‘as appropriate’ (Rule 93) on any issue, including in relation to an amendment to the charges (Rule 128), joint and separate trials (Rule 136) and assurances made by the Court (Rule 191), although they do not translate such a possibility into a right of victims.⁵² What remains problematic, in this respect, is how victims will be selected, since no application seems to be required for the purpose of exercising these faculties; furthermore, the identification of victims prior to the opening of an investigation (as provided for by Article 15(3)) may prove to be a challenging task for the judges.⁵³

⁵¹ Note that the Court has no explicit obligation to act on the information provided by victims under Art. 19(3) ICCSt. See Decision inviting the Democratic Republic of the Congo and the Victims in the Case to Comment on the Proceedings pursuant to Article 19 of the Statute, *Thomas Lubanga Dyilo* (‘Lubanga’) (ICC-01/04-01/06-206), Pre-Trial Chamber (‘PTC’) I, 24 July 2006, in which PTC I invited the Democratic Republic of the Congo and the victims of this case to make their submissions.

⁵² In Decision on “Demande de déposition du représentant légal des demandeurs des victimes”, *Lubanga* (ICC-01/04-01/06-1004), TC I, 25 October 2007, the Chamber considered the requests of the legal representative of a number of victims to be allowed to make submissions regarding victims’ participation issues which have not been covered in the submissions of the current victims’ representatives, pursuant to Rules 103 and 93. The TC noted that it had not sought the views of other victims as is allowed for under Rule 93 of the Rules and rejected the application.

⁵³ For example, in the situation in Kenya, the PTC requested the Victims Participation and Reparations Section (‘VPRS’) to: ‘(1) [I]dentify, to the extent possible, the community leaders of the affected groups to act on behalf of those victims who may wish to make representations (collective representation); (2) receive victims’ representations (collective and/or individual); (3) conduct an assessment, in accordance with paragraph 8 of this order, whether the conditions set out in rule 85 of the Rules have been met; and (4) summarize victims’ representations into one consolidated report with the original representations annexed thereto.’ See Order to the Victims Participation and Reparations Section Concerning Victims’ Representations Pursuant to Article 15(3) of the Statute, *Situation in the Republic of Kenya* (ICC-01/09-4), PTC II, 10 December 2009, § 9.

It is in Part VI of the Statute that the victim participation scheme, incorporating the victims' right to present their views and concerns in the proceedings, is framed. The scope and the means of victims' participation in the proceedings largely remain in the hands of the judges. Indeed, Article 68(3) explicitly provides that the judges have the faculty of determining the timing and the manner of victims' participation, in consideration, respectively, of its appropriateness and its consistency with fair trial rights. Moreover, the vague wording used in Article 68(3)⁵⁴ indisputably gives the judges further margin of discretion in the task of shaping the victims' participation scheme. Although victims' participation is a statutory right, its conditioned exercise supports the position of victims as *participants* (implying a limited procedural position) in the criminal process, as opposed to *parties* (implying a more substantial role at trial and broader procedural rights, including the right to present evidence and witnesses).⁵⁵

In order to meaningfully participate in the proceedings, victims have the right to choose a legal representative. Article 68(3) gives victims the statutory right to present their views and concerns before the Court when their personal interests are affected. However, as also indicated in this Article, it is generally for their legal representatives to undertake this task on the victims' behalf.⁵⁶ Vicarious participation is preferable for two main reasons: on the one hand, if legal representatives appear for a group of victims, this reduces the number of voices before the Court, thus simplifying the procedure; and on the other hand, legal representatives are better skilled than victims themselves (at least, those without a legal training) to represent victims' interests before the Court.⁵⁷

While the victim is in principle 'free to choose a legal representative',⁵⁸ the competent chamber may, for the purpose of ensuring the effectiveness of the proceedings, request that victims or a group of victims choose a common legal representative. If the victims are unable to choose a common legal representative within the time limit set by the Court, the chamber can request that the registrar choose the representative for the victims. In assigning a common

⁵⁴ The existence of so many grey areas is largely due to the so-called 'constructive ambiguity' of diplomatic negotiations. In this respect, see C. Kress, 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise' 1 *JICJ* (2003) 603-617, at 604-606.

⁵⁵ It is interesting to note that the ICCSt. and RPE use interchangeably the term 'participant' and 'party' when referring to victims. The drafting history suggests, however, that the intention of the drafters was to have victims as nothing more than participant. See M.C. Bassiouni, 'International Recognition of Victims' Rights', 6 *Human Rights Law Review* (2006) 203-279, at 245. See also T.M. Funk, *Victims' Rights and Advocacy at the International Criminal Court*, *supra* note no. 1, at 88-91.

⁵⁶ E.g., G.J. Mekjian and M.C. Varughese, 'Hearing the Victims: Analysis of Victims' Advocate Participation in the Trial Proceedings of the International Criminal Court', 17 *Pace International Law Review* (2005) 1-46, at 25.

⁵⁷ ICC, Decision on Victims' Participation, *Lubanga* (ICC-01/04-01/06-1119), TC I, 18 January 2008, at § 23.

⁵⁸ Rule 90(1) ICC RPE.

legal representative to a group of victims, it is important that the Court's organs take all reasonable steps necessary to ensure that the selection of the common representative takes into account the distinct interests of the victims and avoids conflict of interests. Moreover, the Court has held that this selection must consider the views of the victims and respect local traditions.⁵⁹

Arguably, the right of victims to employ a legal representative of their choosing is particularly limited in the context of choosing a common legal representative among a group or where the victim has limited financial resources to pay the representative. It is, nonetheless, worthy of remark that the Court has put some effort into trying to elaborate a set of criteria for grouping victims and for ensuring a meaningful representation of the individual interests by common legal representatives.⁶⁰

As will be further analysed in Section 5 of this Chapter, victims' legal representatives may hence attend and participate in proceedings (unless the Chamber decides that their presence should be confined to written observations), they may make opening and closing statements; present victims' views and concerns; request protective measures and apply to the Court to question witnesses.

3.2 The Right to Reparation

In accordance with the developments that have occurred at the international level in relation to victims' redress for violations of international law, the Rome Statute provides for the possibility for the Court to award reparation to victims. In the event the accused is found guilty, victims may claim reparation, or the Trial Chamber may *proprio motu* order that reparation be granted to them.⁶¹ From the perspective of victims' rights, the reparation phase is envisaged as completely distinct from the trial; this means, *inter alia*, that victims who did

⁵⁹ Regulation 79(2) of the ICC Regulations of the Court. See ICC, Decision on Common Legal Representation of Victims for the Purposes of Trial, *Jean-Pierre Bemba Gombo* ('Bemba') (ICC-01/05-01/08), TC III, 10 November 2010, § 11.

⁶⁰ For example, in ruling on the common legal representation of victims, the Trial Chamber in the *Katanga* case has considered the following elements: (i) whether between the victims there were tensions in terms of ethnicity, age, gender or the type of crimes they were allegedly victims of; and 2) whether some of the victims have perpetrated some of the crimes which victimized the others. In view of these elements, the Court divided the victims in two groups (previously to this decision, victims were represented by eight different common legal representatives): in one group the former child soldiers, in the other all the remaining victims wishing to participate in the case. ICC, Order on the Organization of Common Legal Representation of Victims, *Germain Katanga and Mathieu Ngudjolo Chui* ('Katanga') (ICC-01/04/07-1328), TC II, 22 July 2009, at §§ 12-13.

⁶¹ Art. 75 ICCSt.

not participate in the trial proceedings may still claim reparation and participate in the relevant proceedings held against a convicted person.

Within this phase, Article 75 of the Rome Statute and the relevant rules grant victims the procedural status of a ‘party’, as opposed to ‘participant’. This means that victims may, at least in principle, participate to a higher degree in reparation proceedings and could possess all relevant procedural rights.⁶² For example, unlike in trial proceedings, victims’ right to question witnesses during the reparation hearing is more comprehensive and cannot be limited to written observations or submissions pursuant to Rule 91(4). Subject to leave by the Chamber, victims may also question experts and persons concerned. Furthermore, the legal representatives of victims adversely affected by the reparation order are allowed to appeal it, contrary to the final judgment, which is only appealable by the prosecution and the defence.

As to the forms of reparations orders that can be made by the Court, an award can be made either directly against a convicted person, or through the Trust Fund for Victims, which acts as a depository for any assets seized from a suspect or accused for the eventual purposes of reparation, if for instance, at the moment of the award it is ‘impossible or impractical’ to make individual awards directly to each victim.⁶³ Moreover, the Court can make an award of reparation through the Trust Fund ‘where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate.’⁶⁴

Pursuant to Article 75 of the ICC Statute, the principles upon which reparation awards will be based are to be established by the Court. Although it was initially thought that these principles would have been adopted by the Court prior to the first reparation proceedings,⁶⁵ it was later clarified that these principles would be developed through the Court’s jurisprudence. It was indeed on 7 August 2012 that Trial Chamber I established, for the first time, principles on reparation in relation to the first individual convicted before the Court, Thomas Lubanga Dyilo, who was found guilty of the war crimes of enlisting and conscripting children under the age of fifteen years and using them to actively participate in hostilities.⁶⁶ As Francioni

⁶² E.g., S. Zappalà, ‘The Rights of Victims v. the Rights of the Accused’, *supra* note no. 45, at 157; H. Friman, ‘The International Criminal Court and Participation of Victims: A Third Party to the Proceedings?’ 22 *Leiden Journal of International Law* (2009) 485-500, at 497.

⁶³ Rule 98(2) ICC RPE.

⁶⁴ Rule 98(3) ICC RPE. In addition, the Trust Fund may use resources obtained through voluntary contributions or fundraising to undertake specific activities and projects for the benefit of victims and their families (Art. 79 ICCSt.)

⁶⁵ Redress Trust, ‘Justice for Victims: The ICC’s Reparation Mandate’, 20 May 2011, at 24, available online at http://www.redress.org/downloads/publications/REDRESS_ICC_Reparations_May2011.pdf (last visited on 26 June 2013).

⁶⁶ ICC, Decision Establishing the Principles and Procedures to Be Applied to Reparations, *Lubanga* (ICC-01/04-01/06-2904), TC I, 7 August 2012.

noted, Article 75 of the ICC Statute assigns to the Court a ‘limited law-making function’, as the development of principles on reparation may eventually lead to the establishment of ‘new law’ on the subject.⁶⁷ As such, it is regrettable that the Court found that the principles established in the *Lubanga* decision ‘are limited to the circumstances of the case’⁶⁸ and did not provide for wide reparation principles which could be used as a reference for future cases.

Nonetheless, the Court has relied extensively on established law and practice relating to forms of reparation such as restitution, compensation and rehabilitation, reflecting both settled norms (‘the right to reparations is a well-established and basic human right’),⁶⁹ as well as emerging ones.⁷⁰ Framing the principles within existing international standards, the Court has certainly paved the way for the consolidation of general principles on reparation for victims of international crimes, particularly in cases of mass atrocities. At the time of writing, the Trust Fund has not yet designed and implemented a reparation programme based on the principles elaborated by the Court in the *Lubanga* case; as already suggested by the Court, however, it can be expected that it will favour collective and symbolic reparation, given that the accused has been found indigent.⁷¹

⁶⁷ F. Francioni, ‘Reflections on Victims’ Reparations and on Universal Jurisdiction’, in M. Politi and F. Gioia (eds) *The International Criminal Court and National Jurisdictions* (Aldershot: Ashgate, 2008) 140-148, at 142.

⁶⁸ ICC, Decision Establishing the Principles and Procedures to Be Applied to Reparations, *supra* note no. 66, § 181.

⁶⁹ *Ibid.*, § 185.

⁷⁰ For instance, the Court stressed the need for a gender inclusive approach to reparations, see *Ibid.*, § 202.

⁷¹ *Ibid.*, §§ 219-221 and 274.

4 VICTIMS' RIGHTS IN INTERNATIONALIZED CRIMINAL TRIBUNALS

The introduction of a victim participation and reparation scheme at the ICC constitutes a significant advance in international criminal law. As mentioned in the introduction to this Chapter, the ICC model influenced, in the years following the adoption of the Rome Statute, the procedural models of two internationalized criminal tribunals, the Extraordinary Chambers in the Courts of Cambodia and the Special Tribunal for Lebanon. Although in different ways, both these tribunals allow victims to participate in the proceedings. The ECCC has also the power to award reparation to victims.

4.1 Victims' Rights at the Extraordinary Chambers in the Courts of Cambodia

The rights or needs of victims were hardly addressed in either the ECCC Law⁷² or the Agreement between the United Nations and the Royal Government of Cambodia on the Establishment of the ECCC.⁷³ This oversight most likely had to do with the fact that Cambodian criminal procedure already provided for victim's participation, either as initiator of a complaint or as a civil party. It soon became apparent, however, that the domestic victims' participation scheme would not work at the ECCC due to the large number of victims and the complexity of the crimes charged.⁷⁴ The American Ambassador David Scheffer, who actively participated in the establishment of the Cambodian tribunal, explained that:

[D]uring the 1990's and the most intensive stage of negotiations for the law on the ECCC, there was almost no discussion about victims' rights. While at first blush this may seem odd, one might nevertheless imply a right of civil parties to participate given the considerable body of rights for civil actions afforded victims in criminal trials under Cambodian criminal procedure law, which is heavily influenced by the French civil law system. But the heavy lifting on victims' rights awaited the drafting of the Internal Rules by the judges, which was preceded by several intensive studies by experts and non-governmental organizations of what could and should be addressed in those rules for the victims.⁷⁵

⁷² Law On The Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).

⁷³ Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, UN Doc. A/Res57/228B (Annex), 13 May 2003.

⁷⁴ B. McGonigle, 'Two for the Price of One: Attempts by the Extraordinary Chambers in the Courts of Cambodia to Combine Retributive and Restorative Justice Principles', 22 *Leiden Journal of International Law* (2009) 127-149, at 139.

⁷⁵ Cited in M Saliba, 'Civil Party Participation at the ECCC: Overview', *The Trial Observer*, 6 November 2009, available online at <http://www.cambodiatribunal.org/blog/2009/11/civil-party-participation-eccc-overview> (last

The statutory rights of victims are hence set out in the Internal Rules, which form the authoritative source of procedural law at the ECCC.⁷⁶

4.1.1 The Right to Participation

As in Cambodian criminal procedure, victims may participate in the proceedings of the ECCC as complainants and *parties civiles*, other than as witnesses. Clearly, these roles have been necessarily adjusted with the aim of creating a workable approach to victims' participation in cases of mass victimizations. Each role, as will be illustrated below, offers varying degrees of involvement in the proceedings.

A. VICTIM COMPLAINANT

Victims, like other individuals, may submit complaints to the Court in order to make the co-prosecutors aware of particular crimes.⁷⁷ In turn, the co-prosecutors may seek further information about the alleged crimes and may call the complainants to testify. In contrast to civil parties in domestic proceedings, victims complainants interviewed by the co-investigating judges do not have right to have counsel present at these meetings.⁷⁸ Moreover, unlike in domestic procedure, complainants cannot initiate prosecutions if the co-prosecutors decide not to take action regarding their complaints, nor can they force the co-prosecutors or the co-investigating judges to undertake a specific investigation.

visited on 26 June 2013); see also Human Rights Now, Justice for Victims: Fundamental Issues for the Extraordinary Chambers in the Courts of Cambodia, 13 September 2006, available online at <http://hrn.or.jp/eng/JusticeforVictims%28HRN-Japan%29english.pdf> (last visited on 26 June 2013).

⁷⁶ On 13 June 2007, the ECCC's Judicial Committee on the Rules of Procedure, composed of both national and international judges serving in their capacity as rule makers, issued Internal Rules that provided for civil party action purporting to confer victims extensive participatory rights. The Committee explained the basis and scope of the civil party process as follows: '[A] complex issue has been how to ensure the rights and involvement of victims. While a familiar element of Cambodian law, this was not spelled out in detail in the ECCC Law and Agreement. [...] We note that the ECCC is a court within the existing court structure of Cambodia. We interpreted this to mean that victims have the right to join as civil parties. However, due to the specific character of the ECCC, we have decided that only collective, non-financial reparation is possible.' Joint Press Statement by the Committee, 'Roundup: ECCC Overcomes Complexity, Adopts Internal Rules for DK Trials', 13 June 2007. The Internal Rules were last amended on 12 August 2011.

⁷⁷ ECCC, Practice Direction 02/2007/Rev.1, Victim Participation, Art. 2, 27 October 2008; Rule 49(2) ECCC IR.

⁷⁸ ECCC, Rule 55(5)(a) ECCC IR.

B. CIVIL PARTIES

In addition to intervening as complainants, victims may constitute themselves as civil parties in the criminal case. As in domestic law, victims who are granted civil party status may participate throughout the criminal process and claim reparation. Victims applying to become civil parties may do so at any time during the investigation stage before the trial commences. Once their application is accepted, pursuant to Rule 23, civil parties are entitled to participate in the criminal proceedings against the accused person ‘by supporting the prosecution’ and seeking ‘collective and moral reparations.’

Victims participating as civil parties are entitled to a number of rights, in contrast with victims acting as complainants. Indeed, civil parties are full parties to the proceedings; this means, *inter alia*, that they have in principle the same rights as are afforded to an accused person. Their participation includes a full presence during both the trial phase and the pre-trial phase when the case is being reviewed by the Co-Investigating Judges. During the pre-trial stage, civil parties may request investigations and may appeal decisions by the co-investigating judges not to investigate.⁷⁹ At trial, civil parties, like the accused, do not testify under oath⁸⁰ and, through legal representatives are granted a series of rights, including the right to have full access to the case file,⁸¹ to make appeals,⁸² to make legal and factual submissions, to attend hearings, to call and question witnesses,⁸³ to question the accused⁸⁴ and to make closing arguments.⁸⁵

As with the ICC, legal representatives are crucial for the effective exercise of civil parties’ rights in the proceedings. The recently revised Internal Rules marked an important shift with respect to the legal representation of civil parties. First, after the issuing of the closing order,⁸⁶ all civil parties are both required to have and are entitled to representation by a lawyer in order to participate in the proceedings (Rule 23ter(1)). In principle, civil parties are free to be represented by a lawyer of their own choosing; however, an individual civil party may be directed by the chamber to join an existing civil party group and share a common lawyer, provided that the interests of the distinct parties are represented and conflicts of interest are avoided.

⁷⁹ Rule 55(10) ECCC IR.

⁸⁰ Rule 24(2) ECCC IR.

⁸¹ Rule 86 ECCC IR.

⁸² Rules 23(a) and 74(f) ECCC IR.

⁸³ Rules 139 and 91 ECCC IR.

⁸⁴ Rule 90 ECCC IR.

⁸⁵ Rule 94 ECCC IR.

⁸⁶ Pursuant to Rule 67(1) ECCC IR, the main purpose of the closing order is either to indict a charged person and send him or her to trial, or to dismiss the charges against him or her.

The second amendment requires all of the civil parties to consolidate into one group at the trial stage.⁸⁷ The individual lawyers who represented the civil parties during the pre-trial phase are expected to continue to provide assistance to the new figure of ‘Civil Parties Lead Co-Lawyers’ during the proceedings. This new structure, comprising one consolidated civil party, which made its entry into the proceedings at the start of *Case 002*, is expected to address a variety of issues raised in the first trial before the Chambers (*Duch* case) where civil parties have been represented by four different groups, each with at least one national and one international attorney, both of whom had standing to appear before the Chamber.⁸⁸ As a matter of fact, during the *Duch* trial it became clear that allowing each civil party group to intervene in the proceedings, and allowing them to pose unlimited questions to witnesses, including experts and the accused, could have a considerable impact on the length of the trial itself.⁸⁹ In an attempt at reducing long and duplicate questioning by the parties, the Trial Chamber allocated specific time slots for each party, limiting the amount of time available for questioning. This system, however, was thought to be unsustainable in the second case before the Chambers, where an estimated 3,000 victims sought to apply for civil party status in a trial against four defendants. The revised IRs seek to maintain the group-system by allowing for the various civil party attorneys to provide specific advice to the Civil Party Lead Counsels, and even allow for them to participate in court on an *ad hoc* basis in agreement with the Lead Counsels.

It remains, however, doubtful whether the Lead Co-Lawyers must attend to the views of civil party lawyers in undertaking their mandate. Consolidating all the victims in one group potentially poses issues as to the representation of individual interests before the court: as already observed by the ICC, victims may represent a wide range of ethnic, religious and national backgrounds, which may result in conflicting interests and strategies within the consolidated group. The risk is then that individual interests will be subjugated to the interest of the common consolidated group during trial. In these circumstances the role of the civil party lawyers becomes crucial, as they are those in charge of voicing these divergent interests of their clients to the Lead Counsel.

⁸⁷ Rule 23(3) ECCC IR.

⁸⁸ The civil parties were not grouped together in any logical way (such as class of victim or type of injury). Instead the four different groups evolved from the fact that different intermediary organizations helped collect civil party applications and each wanted to represent their own group of victims separately. Not only did this create a problem of consistent representation, but it also had the unintended effect of unnecessarily prolonging the proceedings.

⁸⁹ A. Werner, D. Rudy, ‘Civil Party Representation at the ECCC: Sounding the Retreat in International Criminal Law?’, 8 *Northwestern Journal of International Human Rights* (2010) 301-309, at 304.

4.1.2 *The Right to Reparation*

Although seeking reparation is one of the primary objectives of civil parties, the ECCC Internal Rules give the Judges the power to award reparations to civil parties only in the form of ‘collective and moral reparations’.⁹⁰ Collective and moral reparations may include, for instance, the publication of the judgment in news or other media or the financing of a not-for-profit activity to benefit the victims. Notably, in the first case before the ECCC all the claims made by civil parties such as memorials or trust funds for victims were rejected because they either ‘lacked specificity’ or ‘were beyond the scope of available reparations before the ECCC’.⁹¹ Accordingly, the Court ordered reparations only in the form of (i) listing the names of all accepted civil parties and the name of any family member who died at Khmer Rouge S-21 prison in the TC Judgment, and (ii) an order for a compilation of all statements of apology and acknowledgments of responsibility made by Duch during the course of the trial.⁹²

A 2010 amendment to the Internal Rules now requires the lead co-lawyers to make a single claim for collective and moral reparations on behalf of all civil parties.⁹³ Moreover, the amendment indicates that collective and moral reparations have to (i) acknowledge the harm suffered by civil parties as a result of the commission of the crimes for which the accused has been found guilty, and (ii) provide benefits to the civil parties which address this harm.⁹⁴ Given that the accused before the Court have been found indigent, it does not appear that the Rules amendment will offer new avenues of reparation to victims, other than the bare minimum, such as the publication of the final judgment.

4.2 **Victims’ Rights at the Special Tribunal for Lebanon**

The STL victims’ participation scheme, while taking into account Lebanese criminal procedure, has been designed very much along the lines of that set out by the ICC. For instance, the participation of victims in the investigation stage, hotly contested at the ICC, has been explicitly ruled out. Unlike the Lebanese Code of Criminal Procedure, which allows a victim to act as a civil party and to initiate a public action, the STL RPE do not allow victims to participate until the formal accusations against the accused have been confirmed.⁹⁵ In accordance with Article 11 of the Statute it is for the prosecutor, as a representative of the

⁹⁰ Rule 23 quinquies ECCC IR.

⁹¹ ECCC, Judgment, *Kaing Guek Eav, alias Duch* (‘Duch’), TC, 26 July 2010, Section 4.4.3.

⁹² Ibid., §§ 682-683.

⁹³ Rule 23 quinquies (2).

⁹⁴ Rule 23 quinquies (1).

⁹⁵ Art. 17 STLSt., Rule 86(A) STL RPE.

public interest, to decide *proprio motu* whether or not to bring a criminal action in accordance with his chosen prosecution strategy. At most, the victim may be allowed transmit to the prosecutor any information he considers useful to determine the truth. The prosecutor remains, however, free to decide how to use such information. Following the confirmation of the indictment victims are then entitled to a set of procedural rights.

4.2.1 *The Right to Participation*

The STL Statute and the Rules of Procedure and Evidence grant victims wide-ranging rights to participate in the proceedings. Following the confirmation of the indictment, and prior to the start of the trial, the Pre-Trial judge may decide to hear victims or invite the legal representative to file written submissions.⁹⁶ Moreover, the RPE provide that the Pre-Trial Judge shall order the legal representative to file the list of witnesses that they intend to call and provide the list of exhibits intended to be admitted as evidence.⁹⁷

During the trial, victims participating in the proceedings have significant powers to present their views and concerns.⁹⁸ A victim participating in the proceedings may make an opening and closing statement in addition to, as observed above, requesting the Trial Chamber to authorise the legal representative to call witnesses and produce additional evidence.⁹⁹ The Trial Chamber may also authorise the legal representative to examine or cross-examine witnesses and file motions and briefs, subject to its authorisation and control.¹⁰⁰ Furthermore, unless the Pre-Trial Judge or the Trial Chamber determines any appropriate restriction in the interests of justice, a victim participating in the proceedings is entitled to have access to documents filed by the parties, excluding any confidential material and material which has been made available to the prosecutor the defence alone.¹⁰¹

In order to exercise the aforementioned powers, a victim participating in the proceedings must be kept informed of the progress of the proceedings and, unless the Pre-Trial Judge or the competent chamber decides otherwise in the interests of justice, the victim shall also be notified of the pre-trial case file.¹⁰² Despite this potentially broad procedural

⁹⁶ Rule 89(D) STL RPE.

⁹⁷ Rule 91(H)(i) and (ii) STL RPE.

⁹⁸ Article 17 STLSt. No difference has been statutorily set between victims' participatory rights in trials *inter partes* and trials *in absentia*.

⁹⁹ Rule 87(B) STL RPE.

¹⁰⁰ *Ibid.*

¹⁰¹ Rule 87(A) STL RPE.

¹⁰² *Ibid.*

status, victims' participation is to be strictly regulated to ensure that it is not 'prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.'¹⁰³

To this end, the RPE sets out a range of measures to balance victims' rights with the accused's rights. First of all, a victim participating in the proceedings must be expressly authorised to exercise participatory rights by the Pre-Trial Judge or the chamber with the necessary jurisdiction.¹⁰⁴ Furthermore, the number of victims invited to submit their 'views and concerns' may be limited and, in any event, unless otherwise decided, victims' participation will be exercised through common legal representatives.¹⁰⁵ In the first case before the STL, the Pre-Trial Judge found that the rules on victims' legal representation 'suggest that unless there are valid reasons to justify not doing so, the VPPs are presumed to be treated as a single group'.¹⁰⁶ All the victims participating in the proceedings are, at present, represented by a single legal representative.

Contrary to the ECCC, which is also based on a civil law procedural system, a victim participating in the proceedings cannot directly question the accused but may do so only through a judge.¹⁰⁷ Similarly, a victim participating in the proceedings shall not be permitted to testify, except from in those circumstances in which the chamber considers that this is in the best interests of justice.¹⁰⁸ Finally, victims' participation during the sentencing stage is limited to expressing, subject to the Trial Chamber's authorisation, the impact the crime committed had on them personally.¹⁰⁹ Indeed, in order to ensure that the rights of the accused are fully safeguarded and to avoid any sense of revenge, only the prosecutor in representing the public interest is authorised to argue for a particular sentence.¹¹⁰ Similarly, victims cannot appeal a judgment or a sentence.

4.2.2 The Right to Reparation

Unlike the ICC and the ECCC, victims are not entitled to claim reparation for the harm suffered before the Tribunal. As with the ad hoc Tribunals, victims are required to bring their

¹⁰³ Rule 86(B)(iv) STL RPE.

¹⁰⁴ Art. 17 STLSt.

¹⁰⁵ Rule 86(C) STL RPE.

¹⁰⁶ STL, Decision on VPU's Access to Materials and the Modalities of Victims' Participation in Proceedings before the Pre-Trial Judge, *Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi and Assad Hassan Sabra*, Pre-Trial Judge, 8 May 2012, § 119.

¹⁰⁷ Rule 144(B) STL RPE.

¹⁰⁸ Rule 150(D) STL RPE.

¹⁰⁹ Rule 87(C) STL RPE.

¹¹⁰ Rule 171(A) STL RPE.

claims before domestic courts or any other competent institutions to obtain some form of reparation. Pursuant to Article 25 of the STL Statute:

Based on the decision of the Special Tribunal and pursuant to the relevant national legislation, a victim or persons claiming through the victim, whether or not such victim had been identified as such by the Tribunal under paragraph 1 of this article, may bring an action in a national court or other competent body to obtain compensation.’

Pursuant to recent amendments in the RPE, victims (or those considering themselves victims) may be issued a certified copy of the judgment in order to seek compensation before a competent tribunal (Rule 86(G)). This amendment was introduced in the hope of facilitating victims in their claims for compensation. Although the judgment of the Special Tribunal is to be considered final and binding with regard to the criminal responsibility of the convicted person (Art. 25(4) STL Statute), doubts remain as to whether the identification of victims made by the STL is also binding on other courts.

5 VICTIMS' RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS AND THE RIGHT TO JUSTICE

5.1 Some Preliminary Remarks

At the beginning of this Chapter it was noted that the inclusion of a regime of victim redress in recently established international and internationalized criminal tribunals marks a departure from the classical framework of international criminal law. The question that the conferral of victims' rights in the procedure of these tribunals raises is whether the creation of a regime of victim redress in the context of international criminal law can be seen as the affirmation of a right to justice for victims of international crimes.

In Chapter III, it was argued that a right to justice is emerging as an integral component of remedy for victims of gross human rights violations. It was also noted that a number of obstacles remain, at the domestic level, with regards to the effective exercise of such a right. Moreover, as discussed in Chapter V, certain domestic criminal systems remain reluctant to recognise victims' participatory rights in proceedings, impinging on victims' attempts to enforce their right to justice.

Furthermore, the concrete realisation of victims' right to justice in cases of gross violations of human rights remains problematic. In post-conflict situations, for example, domestic courts often face systemic failures that prevent them from effectively investigating and prosecuting international crimes. From this perspective, the establishment of international or hybrid criminal tribunals becomes a means not only to fight impunity but also to provide justice for victims of atrocities. Notwithstanding the fact that it is primarily for states to implement the rights of victims (including in the area of investigation and prosecution of human rights offenders) often international criminal courts and tribunals are the only *fora* where victims can make their voice heard.

In this regard, it can be argued that the procedure of international criminal trials – originally based on the 'duel' between the prosecution and the defence – has been adapted with the aim of taking into account the development of a victims' right to justice in cases of gross violations of human rights. This entails that, alongside the criminal accountability of wrongdoers, the need to incorporate victims' voices in the criminal process through some form of participation has emerged as a component of the mandate of international criminal tribunals.

Three elements of the law and practice of international criminal tribunals support this thesis: (i) victims have been granted certain participatory rights that contribute to the effective realisation of their right to justice; (ii) international criminal tribunals have indicated that the prosecution of offenders is an element of victim's right to reparation; and (iv) an emerging trend in the practice of international criminal tribunals emphasises the need to ensure the *effective* exercise of victims' participatory rights in the proceedings. In this section each element will be examined in turn.

5.2 The Legal Character of and Rationale for Victims' Participatory Rights in International Criminal Proceedings

As discussed above, victim participation schemes in proceedings before international and internationalized criminal tribunals have distinct characteristics. While victims have the position of *participants* before the ICC and the STL (meaning that the timing and form of their participation is subject to the discretion of the competent chamber), before the ECCC victims may participate as *civil parties*, in conformity with the Cambodian criminal procedure. This means, *inter alia*, that they are full parties to the proceedings and do not need to seek prior permission of the chamber to participate in the proceedings (once their civil party applications have been admitted). Notwithstanding the intrinsic differences of these schemes, one common aspect must be highlighted at the outset. Participation in proceedings is conceived as a right accruing to victims and not as a mere privilege. This is clear from the wording of the statutory provisions detailing victims' participation, which indicates that when the conditions for participation are met, the courts are duty-bound to enable victims to participate in their own right in the proceedings.¹¹¹

It is not only the legal character of, but also the rationale for victims' participation that appears to be the same before the courts under examination. Indeed, a close inspection of the legal rationale associated with victims' participation reveals that courts have read the exercise of this right as linked to the effective realisation of other victims' rights, such as the right to justice and the right to truth, in conformity with human rights standards.

¹¹¹ For instance, Art. 68(3) ICCSt. and Art. 17 STLSt. use the expression '*shall* permit their views and concerns to be presented and considered' (emphasis added). Cf. Art. 15(3) ICCSt.: 'Victims *may* make representations to the Pre-Trial Chamber' (emphasis added). In this respect, one may also recall the oft-cited words by Judge René Blattman who, writing in dissent in the first decision on victims' participation in trial proceedings before the ICC, held that 'victims participation is not a concession of the Bench, but rather a right accorded to victims by the Statute.' ICC, Separate and Dissenting Opinion of Judge René Blattmann, Decision on Victims' Participation, *supra* note no. 57, § 13.

An ICC Pre-Trial Chamber found that the participation of victims in the investigation stage ‘can serve to clarify the facts, to punish the perpetrators’.¹¹² Similarly, in *Lubanga*, this Chamber held that victims may participate in the confirmation hearing by presenting their views and concerns in order to ‘contribute to the prosecution of the crimes... and to be able to obtain reparations for the harm suffered.’¹¹³ This view has been also upheld in subsequent decisions of other ICC Chambers. For instance, the Single Judge in *Katanga* stated that victims have a legitimate interest in the determination of the guilt or innocence of the accused, as such a determination satisfies their right to truth and justice.¹¹⁴ In a similar vein, the Single Judge in *Bemba* held that victims’ personal interests in the proceedings result not only from their desire to obtain compensation but also to see justice being done.¹¹⁵ Similarly, the Single Judge in *Abu Garda* maintained that the personal interest of the victims in the proceedings ‘flows from (i) their desire to have a declaration of truth by a competent body (right to truth); (ii) their wish to have those who victimized them identified and prosecuted (right to justice) and (iii) the right to reparation’.¹¹⁶

This view has also been supported by the case law of the ICC Appeals Chamber. Reference could be made, for instance, to the decision concerning the participation of victims in appeals relating to the interim release of a person subject to a warrant of arrest. In this respect, the Chamber granted victims leave to participate in the proceedings, holding that their interests were affected because of ‘the nature of the appeal’.¹¹⁷ It has been argued that, in so doing, the Appeals Chamber indirectly recognised that victims have legitimate interests in the proceedings that go beyond the issue of reparation.¹¹⁸

The law and practice of the other internationalized criminal tribunals under examination also support the idea that victims’ participation in criminal proceedings is linked to the realisation of their right to justice or, at least, to a legitimate interest in the identification

¹¹² ICC, Decision on Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, *Situation in the Democratic Republic of the Congo* (ICC-01/04-101/tEN-Corr), PTC I, 17 January 2006, § 63.

¹¹³ ICC, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 in the Hearing of Confirmation of Charges, *Lubanga* (ICC-01/04-01/06-462), PTC I, 22 September 2006, at 6.

¹¹⁴ ICC, Decision on the Set of Procedural Rights Attached to the Procedural Status of Victim at the Pre-Trial Stage of a Case, *Katanga* (ICC-01/04-01/07-474), PTC I, 13 May 2008, §§ 30-35, 39-42.

¹¹⁵ ICC, Fourth Decision on Victims’ Participation, *Bemba* (ICC-01/05-01/08-320), PTC III, 13 December 2008, § 90.

¹¹⁶ ICC, Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case, *Idriss Abu Garda* (ICC-02/05-02/09-121), PTC I, 25 September 2009, § 3.

¹¹⁷ ICC, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo’, *Lubanga* (ICC-01/04-01/06-824), AC, 13 February 2007.

¹¹⁸ J.C. Ochoa S., *The Rights of Victims in Criminal Justice Proceedings for Serious Human Rights Violations*, *supra* note no. 1, at 254-255.

and accountability of those responsible for the crimes at issue. Internal Rule 23 of the ECCC, for instance, establishes that the purpose of civil party participation is not limited to the right to seek reparation, but also covers the right to ‘participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution.’¹¹⁹

This view has also been supported in some decisions of the ECCC. For instance, the Pre-Trial Chamber observed that participation in the proceedings arise from two core rights, ‘the right to truth and the right to justice.’¹²⁰ Like the ICC Appeals Chamber, the ECCC Pre-Trial Chamber has also held that victims have a legitimate interest in procedures relating to an appeal against a provisional detention order, confirming that victims’ interests go well beyond their claim for compensation.¹²¹

The idea that victims’ participation is associated with the realisation of the right to justice and truth was also expressed by Antonio Cassese, as President of the STL, in his first Explanatory Memorandum to the Rules of Procedure and Evidence:

Notwithstanding that the trial proceedings in the Tribunal are not aimed at determining compensation but rather at establishing whether an accused is guilty or innocent, the drafters of the RPE deemed it fair and appropriate to grant extensive participation in proceedings to victims.¹²²

Relying on the rationale of civil action in criminal proceedings, Cassese acknowledged that despite one of the purposes of the action – that of civil compensation – is absent in the STL procedure victims are still able to pursue another objective, namely ‘contributing to the determination of the guilt or the innocence of the accused.’¹²³

Victims’ participation in the proceedings is also linked to their claims for reparation. In this respect, the three courts under consideration adopt very different mechanisms. Within the ICC, the reparation regime is independent from victims’ participation in proceedings; that is, victims do not need to participate in pre-trial or trial stages in order to apply for reparation awards.¹²⁴ On the contrary, participation in the proceedings is necessary in the ECCC as civil

¹¹⁹ Rule 23(1), ECCC IR.

¹²⁰ ECCC, Directions on Unrepresented Civil Parties’ Rights to Address the Pre-Trial Chamber in Person, *Ieng Sary*, PTC, 29 August 2009, § 8.

¹²¹ ECCC, Decision on Civil Party Participation in Provisional Detention Appeals, *Nuon Chea*, Pre-Trial Chamber, 20 March 2008, § 40.

¹²² STL President’s Explanatory Memorandum of the Rules of Procedure and Evidence, 10 June 2009, § 15.

¹²³ Ibid., § 14, referring to V. Dervieux, ‘The French System’, in M. Delmas-Marty and J. R. Spencer (eds.), *European Criminal Procedures* (Cambridge: Cambridge University Press, 2002) 218-291, at 227.

¹²⁴ See the ICC Application Form for Individuals, giving to applicants the possibility to apply for participation and reparation in two separate questions. The application form is available online at <http://www.icc->

claims are integrated into the criminal process.¹²⁵ Whilst no regime for victims redress has been created instead within the statutory framework of the STL, the Tribunal's Statute nevertheless establishes, using wording similar to that of the ad hoc Tribunals RPEs, that the judgment is 'final and binding as to the criminal responsibility of the convicted person' for the purposes of a claim for compensation brought before national courts or other competent bodies.¹²⁶ All in all, it is clear that, regardless of the procedural system at stake, victims have an interest in the effective prosecution of those responsible for the crimes, as this is essential for their subsequent claim for reparation. Accordingly, as will be illustrated in the next subsection, by having a voice in the proceedings victims may make their contribution to securing the effective prosecution of the offender.

5.3 Victims' Participatory Rights as a Means to Enforce Their Right to Justice

In the context of international and internationalized criminal trials victims have been granted a number of rights through which they can promote their interest in the prosecution of the offender. Arguably, the affirmation of such rights indicates that victims not only have a legitimate interest in the prosecution of perpetrators but a right to it (the right to justice), as indicated in principle by the courts examined.

Despite the intrinsic differences between the procedural models adopted by these three courts, the choice has been made to consider them together in this section for two main reasons. The first is that the three tribunals share similar concerns, deriving from the need to strike a balance between a number of legitimate objectives such as the fair trial rights of the accused and the right of victims to have their say and to participate in proceedings where their personal interests are affected (as well as a workable procedure that will not be overwhelmed by the number of victims wishing to participate).¹²⁷ As such it may prove interesting to observe whether different solutions have been provided for common problems and, if so, why. The second reason for this comparative analysis is the number of similarities between the victims' participation schemes under examination and the way in which they are

cpi.int/NR/rdonlyres/48A75CF0-E38E-48A7-A9E0-026ADD32553D/0/SAFIndividualEng.pdf (last visited on 26 June 2013).

¹²⁵ Pursuant to Rule 23 quinquies ECCC IR this right is recognised only to persons who have been recognised as civil parties and thus, as such, have participated in the proceedings.

¹²⁶ Arts. 25(3) and (4) STLSt.

¹²⁷ S. Garkawe, 'Victims and the International Criminal Court: Three Major Issues', 3 *International Criminal Law Review* (2003) 345-367, at 359-360.

implemented by the courts. The ultimate aim is to understand the extent to which, notwithstanding their distinct procedural characteristics, these similarities reflect the emergence of a set of core rights to which victims are entitled in the context of international criminal proceedings and which reflect the affirmation of a victim's right to justice.

In order to test this assertion, an analysis will be provided of the specific rights that victims have been granted in the course of proceedings before international and internationalized criminal tribunals. To that end, a distinction can be made between four different phases of the proceedings: (i) triggering proceedings; (ii) pre-trial stage; (iii) trial stage; and (iv) sentencing stage.

5.3.1 *Triggering Proceedings*

Traditionally, the decision of whether to initiate an investigation lay exclusively with the prosecutor of international criminal tribunals. Neither the judges nor the victims had any power to control the preliminary investigations over alleged international crimes. While the power to trigger an investigation remains solely with the prosecutor, this process has developed to the effect that other subjects may influence the prosecutorial strategy. In particular, victims have been granted certain rights that allow them, in a limited manner, to participate in this phase of the proceedings.

First of all, as mentioned above, before all three courts under examination, victims can submit communications to the relevant court about alleged crimes. Even though the prosecutor, or the relevant court organ, is not obliged to initiate an investigation on the basis of such communications, it is nonetheless an important instrument through which victims can promote their right to justice. Other than as complainants, at the ICC victims have been granted the right to intervene in a number of instances during the phase of the proceedings that precedes the confirmation of charges. In particular, it is interesting to analyse the practice of the Court with respect to (i) the initiation of the investigation; and (ii) the participation of victims in the investigations into a particular situation.

A. THE INITIATION OF INVESTIGATIONS

Two different situations have to be distinguished in relation to the initiation of investigations: where the prosecutor initiates an investigation *proprio motu* and where the investigation is based on a referral by a state or by the Security Council. If the prosecutor seeks to initiate an

investigation *proprio motu*, he must seek authorisation from the Court and at this stage victims have an opportunity to participate in the relevant proceedings. In particular, pursuant to Article 15(3) victims may make representations to the Pre-Trial Chamber when the prosecutor requests authorisation to initiate an investigation. The Pre-Trial Chamber has also the power, pursuant to Rule 50(4), to request further information from the victims who made representations and to hold a hearing to hear their views and concerns. Conversely, if the investigation is based on a referral (by a state or by the Security Council), the prosecutor has the discretionary power to proceed without the authorisation of the Court. In that context, victims have no role to play in this phase of the proceedings.

Victims' participation in proceedings relating to authorisation for the initiation of investigation *proprio motu* has been, thus far, limited in scope. In the Kenya situation, for instance, the Pre-Trial Chamber requested that the VPRS identify community leaders of affected groups to act on behalf of victims, to receive victims' representations and, after having evaluated the conditions set out in Rule 85 (on the definition of victim) to summarise victims' representations in a consolidated report.¹²⁸ Despite its limited scope, victims' participation provided significant guidance to the Chamber in its assessment, particularly in relation to the gravity threshold, where the impact of the crimes and the harm suffered by victims was considered. Their input was also useful to the Court in exercising its jurisdiction over a case.¹²⁹ Based on the principle of complementarity, the ICC can only exercise its jurisdiction when a state concerned is unwilling or unable to investigate or prosecute the crimes.¹³⁰ In the *Situation of Kenya*, the Court relied on the victims' consolidated report stating that Kenyan authorities did not appear willing to investigate alleged crimes in order to assess the admissibility of the case.¹³¹

Victims are also granted certain rights where the prosecutor decides not to initiate an investigation. Again, two situations must be distinguished. Firstly, if the prosecutor decides not to proceed with an investigation on the basis of a communication received by victims or other individuals, no review is provided for. This means that victims cannot force prosecution or ask for a review of a decision not to prosecute. This process is consistent with the fact that victims are not allowed to initiate investigations on their own right. As a matter of fact, this

¹²⁸ ICC, Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to Article 15(3) of the Statute, *supra* note no. 53, §§ 5-9.

¹²⁹ Rule 59 ICC RPE.

¹³⁰ Art. 17 ICCSt.

¹³¹ ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya* (ICC-01/09-19), PTC II, 31 March 2010, § 186, footnote 273.

form of involvement would likely prove to be unworkable due to the high number of victims and potential cases.

Secondly, in the case that the prosecutor decides not to proceed with an investigation referred by a state or by the Security Council the Pre-Trial Chamber may review such a decision if it is based on the fact that an investigation would not serve the interests of justice. In this situation, the Pre-Trial Chamber may take victims' concerns into account when making that decision. Although Article 53(3) does not mention victims in the procedure of review of the prosecutor's decision not to initiate a prosecution, the Court can rely on Rule 93, which gives it the power to 'seek the views of victims and their legal representatives ... on any issue' in relation to requests for review under Article 53.

In the ICC practice the possibility of victims participating in proceedings relating to the review of the Prosecutor's decision not to initiate an investigation seems to be uncontested.¹³² The exercise of such a right ensures that proceedings are not terminated arbitrarily without victims' concerns being taken into account. On the contrary, it does not seem that victims can seek to express their views and concerns on the decision not to investigate through *amicus curiae* submissions. In a January 2011 decision, the Pre-Trial Chamber in Kenya held that 'the core rationale underlying an amicus curiae submission is that the Chamber be assisted in the determination of the case by an independent and impartial intervener having no other standing in the proceedings'.¹³³

B. THE PARTICIPATION OF VICTIMS IN THE INVESTIGATIONS OVER A SITUATION

The stage of investigating a situation follows the triggering procedure and precedes the initiation of a case through the issuance of a warrant of arrest or a summons to appear. Victims' participation in the investigation stage remains very much contested. Pre-Trial chambers have consistently argued in favour of victims' participatory rights in this phase of the proceedings.¹³⁴ Victims' rights at this stage entail the right to present views and

¹³² For example, the decision not to investigate or prosecute has been alluded to by the prosecutor as a distinctive trigger-off for the 'proceedings' under the terms of Article 68(3) and for the exercise of participatory rights under this article. See ICC, Prosecution's Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp, *Situation in the Democratic Republic of the Congo* (ICC-01/04-84), Office of the Prosecutor ('OTP'), 15 August 2005, §§ 14-17.

¹³³ ICC, Decision on Application for Leave to Submit Amicus Curiae Observations', *Situation in the Republic of Kenya* (ICC-01/09-35), PTC II, 18 January 2011, § 6.

¹³⁴ ICC, Decision on Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6', *supra* note no. 112. The decision was made on the basis of a three-pronged argument: terminological, contextual and teleological. Firstly, PTC I considered that the term 'proceedings' 'does not necessarily exclude the stage of investigation of a situation' (at § 38). Secondly, the Chamber observed that,

concerns,¹³⁵ to file documents pertaining to on-going investigations, to participate in public proceedings unless otherwise decided by the relevant Chamber in view of fairness or effectiveness concerns,¹³⁶ to request that the Pre-Trial Chamber order special measures (for instance, in relation to victims' protection),¹³⁷ and to be issued all the notifications.¹³⁸ In the Uganda situation, Single Judge Politi also allowed victims to request special investigative measures.¹³⁹

In order to safeguard the rights of the accused special measures such as appointing a special counsel to represent a potential defendant's interests have been envisaged.¹⁴⁰ It is, however, unlikely that this interpretation will be further followed given view of persistent objections of the OTP which has argued that victims' participation during an investigation could jeopardise the integrity and objectivity of the investigation, as well as impact on its efficiency and security.¹⁴¹ Most importantly, the Appeals Chamber has on several occasions overruled the liberal approach of the Pre-Trial Chambers.¹⁴² This approach has also been also the object of numerous criticisms by legal scholars.¹⁴³

whereas Article 68(1) of the Statute makes explicit reference to the investigation stage, such stage is not excluded from the scope of paragraph 3 of the same provision, which specifically addresses victims' participation. Finally, PTC I stressed that an interpretation of article 68(3) as encompassing the investigation stage of a situation is 'consistent with the object and purpose of the victims participation regime established by the drafters of the Statute', as well as with 'the growing emphasis placed on the role of victims by the international body of human rights law and by international humanitarian law.' (at § 50).

¹³⁵ Rule 93 ICC RPE.

¹³⁶ Rule 91(2) ICC RPE.

¹³⁷ Rule 88(1) ICC RPE.

¹³⁸ Rule 92 ICC RPE.

¹³⁹ The Prosecutor strongly opposed this decision, which in his view appeared to stretch too far the notion of 'views and concerns'. ICC, Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, *Situation in Uganda* (ICC-02/04-101), PTC II, 10 August 2007, at §§ 100-101. However, the leave for appeal was rejected. See Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, *Situation in Uganda* (ICC-02/04-112), PTC II, 19 December 2007.

¹⁴⁰ Pursuant to Regulation 77(5) of the Regulations of the Court, the Chamber may designate the Office of Public Counsel for the Defense ('OPCD') as ad hoc Counsel. For example, the OPCD may submit observations in the context of victims' participation in the investigation phase, when there has not yet been an arrest or appearance or when the person who has been arrested or appeared in response to a summons has not yet appointed Counsel.

¹⁴¹ ICC, Prosecution's Response to OPCD's Appeal Brief on the "Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the and Disclosure of Potentially Exculpatory Material", *Situation in the Democratic Republic of the Congo* (ICC-01/04-452), OTP, 15 February 2008, §§ 21-22.

¹⁴² See e.g., ICC, Judgment on Victims Participation in the Investigation Stage of the Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor against the Decision of Pre-Trial Chamber I of 24 December 2007, *Situation in the Democratic Republic of the Congo* (ICC-01/04-556), AC, 19 December 2008.

¹⁴³ E.g., J. de Hemptinne and F. Rindi, 'ICC Pre-Trial Chamber Allows Victims to Participate in the Investigation Phase of Proceedings', 4 *JICJ* (2006) 342-350; S. SáCouto and K. Cleary, 'Victims' Participation in the Investigations of the International Criminal Court', 17 *Transational Law & Contemporary Problems* (2008) 73-105.

5.3.2 *The Pre-Trial Stage*

At the pre-trial stage victims may be entitled to exercise a number of rights before the courts under examination, although with certain significant differences. The main distinction between the three procedural systems is that while, as indicated above, victims can participate in ICC proceedings before the confirmation of charges, at the ECCC and the STL victims can only exercise rights once an accused has been identified. Moreover, at least in principle, victims enjoy broader participatory rights at the ECCC because they are parties to the proceedings, and not simply participants as before the ICC and the STL.

A. VICTIMS' RIGHTS AT THE ICC

As we have already seen, victims can become involved in proceedings at an early stage before the ICC. As will be analysed in this section and in the following ones, a number of provisions of the ICC Statute and Rules of Procedure and Evidence *expressis verbis* confer upon victims certain rights that they could exercise *ex lege*, through their Legal Representative.¹⁴⁴ Beside them, other rights may be granted to the victims, either *proprio motu* by the Chamber or 'upon specific and motivated request submitted by the Legal Representative'.¹⁴⁵

Following preliminary investigations victims can participate in the hearing for the confirmation of charges. Article 61 of the ICC Statute which regulates the confirmation of charges hearing makes no explicit reference to victims. However, victims may have an interest in participating in this phase, *inter alia*, to influence the final formulation of the charges, or even to request measures regarding forfeiture. Moreover, Rule 92(3) explicitly provides for victims' right to notification about the confirmation charges hearing, suggesting that they might be authorised to participate in this specific phase.

According to the OTP, participation of victims in the confirmation hearing is the 'milestone in meaningful victim participation as anticipated in the Statute'.¹⁴⁶ One should not, however, overstate the impact that victims' participation may have on this particular stage of the proceedings. While victims are permitted to participate in confirmation hearing, the means

¹⁴⁴ See Rules 89-92 and 121(10) ICC RPE and Regulation 24 of the Regulations of the Court.

¹⁴⁵ ICC, Decision on the Request for Access to Confidential Inter Partes Material, *Francis Kirimimuthaura, Uhuru Mugai Kenyatta and Mohammed Hussein Ali* (ICC-01/09-02/11-326), PTC II, 14 September 2011, §§ 7-13.

¹⁴⁶ ICC, Prosecution's Reply under Rule 89(1) to the Applications for Participation of Applicants a/0106/06 to a/0110/06, a/0128/06 to a/0162/06, a/0188/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06 and a/0224/06 to a/0250/06, *Situation in the Democratic Republic of the Congo* (ICC-01/04-346), OTP, 25 June 2007, § 24.

of such participation depends on whether the victims are anonymous during the hearing, or if the identities of the victims are known by the accused.¹⁴⁷

The developing jurisprudence suggests that both anonymous and non-anonymous victims are entitled to a set of core rights, including (i) notification of public documents included in the summary of the evidence; (ii) attendance at public ‘status conferences’; (iii) making opening and closing statements in which victims may discuss legal aspects of the case, such as the characterization of modes of liability, or the character of the armed conflict in relation to which crimes have been committed; and (iv) asking leave to intervene during the public status conference or the confirmation hearing.¹⁴⁸ In consideration of the principle prohibiting anonymous accusations, anonymous victims are not, however, permitted to add any point of fact, submit evidence or question witnesses.¹⁴⁹

Despite its relative importance, victims cannot extend the factual basis contained in the prosecution Charging Document, but may nonetheless attempt to extend the legal characterisation of the facts contained therein so that the prosecutor may be asked to amend it.¹⁵⁰ It remains true that the party in charge of the investigation is the prosecutor and as such if the victims want to conduct certain investigations they must request the prosecutor to do so on their behalf. On top of this, within this procedural phase victims cannot ask for the introduction of additional evidence. In *Katanga*, Pre-Trial Chamber I held that ‘the statutory framework provided for by the Statute and the Rules for the pre-trial stage of a case leaves no room for the presentation of additional evidence by those granted the procedural status of victim’.¹⁵¹

During pre-trial proceedings, victims may also be involved in procedures for interim release of a suspect or an accused person. In particular, when deciding on the conditional

¹⁴⁷ On the contrary, Pre-Trial Chamber III rejected the distinction between the procedural status of anonymous and non-anonymous victims. According to PTC III, it would not be fair to ‘punish’ victims in view of the fact that they are granted measures of protection, such as the protection of their identity before the accused. See ICC, Fourth Decision on Victims’ Participation, *Bemba* (ICC-01/05-01/08-320), PTC III, 12 December 2008, § 99.

¹⁴⁸ ICC, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, *supra* note no. 113, at 6. Victims were entitled to the right to access public documents, to attend public status conferences and to attend the public sessions of the confirmation hearing. See also Decision on victims’ modalities of participation at the Pre-Trial Stage of the Case, *Bahar Idriss Abu Garda* (ICC-02/05-02/09), PTC I, 6 October 2009.

¹⁴⁹ Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, *supra* note no. 113, at 7.

¹⁵⁰ See *infra* section 5.3.2 (VIII).

¹⁵¹ Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case’, *supra* note no. 114, § 113. The Chamber noted that according to Article 61(7) of the Statute, the power of the Pre-Trial Chamber is confined to ‘requesting the consideration by the Prosecution of the opportunity to provide additional evidence’ in contrast to Article 69(3) which gives the competent Chamber ‘the authority to request the submission of all evidence that it considers necessary for the determination of the truth.’ *Ibid.*, §§ 107-109.

release of a suspect or accused, the Pre-Trial Chamber is required, under Rule 119(3) to seek the views of victims who have communicated with the Court and whom the Chamber considers at risk as a result of conditional release.

In *Lubanga*'s pre-trial detention appeal, a majority of the Appeals Chamber found that victims would be in principle permitted to participate in this type of appeal under Article 82(1)(b) (which, notably, explicitly grants this right only to parties, and not to participants), but that they are nevertheless requested to seek leave for participation. In other words, victims do not have an automatic right to participate in pre-trial detention appeals, although the Pre-Trial Chamber is required to seek the views of victims, as stated above. Arguably, victims' participation in such proceedings is significant as it enables victims to inform the court about their concerns about interim release (for instance in relation to their safety, and also the effectiveness of the on-going investigations) without having to rely on the prosecutor.

B. VICTIMS' RIGHTS AT THE ECCC

Whereas no limitation seems to be attached to civil parties' rights in the proceedings, their participation in the investigation stage may be subject to certain restrictions. Despite these restrictions, however, during the pre-trial stage civil parties retain a number of important participatory rights which, as expressed by the Pre-Trial Chamber, arise from two core rights, 'the right to truth and the right to justice.'¹⁵² At any time during an investigation, civil parties may request the Co-Investigating Judges ('CIJs') to make orders or undertake an examination the party considers useful for the investigation.¹⁵³ This includes the right to request the Co-Investigating Judges to appoint additional experts, to interview the civil parties themselves, to question witnesses, to order expertise, to visit sites or to collect other evidence on behalf of the civil parties. A civil party lawyer may also be present during an interview of a charged person, subject to the permission of the CIJ. Civil parties may appeal certain orders made during the investigation, including the CIJ's refusal of a request to take a specific

¹⁵² ECCC, Directions on Unrepresented Civil Parties' Rights to Address the Pre-Trial Chamber in Person, Ieng Sary, *supra* note no. 120, at § 8.

¹⁵³ Rule 55(10) ECCC IR. However, the Pre-Trial Chamber held that 'while Civil Parties and Civil Party Applicants may request the CIJs to make such orders or undertake such investigative action as they consider necessary for the conduct of the investigation, the scope of the investigation is defined by the Introductory and Supplementary Submissions.' See Decision on Appeal of Co-Lawyers for Civil Parties against Order Rejecting Request to Interview Persons Named in the Forced Marriage and Enforced Disappearance Requests for Investigative Action, *Nuon Chea et al.*, PTC, 21 July 2010, at § 11. The Pre-Trial Chamber concluded that the IRs do not give Civil Parties the authority to expand an investigation, as such power is vested in the Co-Prosecutors alone. *Ibid.*, at § 38.

investigative action, the declaration of a Civil Party application inadmissible and the refusal of requests for expert reports or further expert investigation allowed under the Internal Rules.¹⁵⁴

Despite an initial trend in the ECCC case law in favour of fairly broad participatory rights,¹⁵⁵ more recently the Pre-Trial Chamber has considerably limited its approach. In particular, the Chamber's change of attitude – dictated by the need to ensure expeditious proceedings, to avoid disruptions, and to safeguard defence rights – focused on the right of civil parties to participate in person in the proceedings. This means that although civil parties are, in principle, parties to the proceedings (in contrast to victims-participants at the ICC and at the STL), they may not have full-party rights equal to those of the prosecution and the defence.¹⁵⁶

First, the Chamber held that civil parties represented by counsel may not speak in person during pre-trial appeals apart from through their legal representatives, and following an amendment of the Internal Rules this decision has been converted into a statutory rule that applies throughout the proceedings.¹⁵⁷ Furthermore, relying on ICC Pre-Trial Chambers' decisions, the ECCC Chamber noted that 'procedural rights can be limited if this is necessary to safeguard other competing interests, applying a principle of proportionality'.¹⁵⁸ In this respect, the Pre-Trial Chamber also observed that, in certain circumstances, the ICC has granted victims' legal representatives broader rights than the victims themselves, including access to the confidential record and closed session hearings.¹⁵⁹ For this reason, the ECCC Chamber found that, in order to balance the rights of all parties, the participation of a legitimately unrepresented civil party may be more limited than that of represented civil parties. Accordingly, for instance, an unrepresented civil party claiming a right to address the

¹⁵⁴ On its decision of 20 March 2008, the Chamber maintained that Rule 23(1)(a) ECCC IR grants civil parties the right to participate in all criminal proceedings, including the proceedings related to the appeal of provision detention during the Pre-Trial phase. Decision on Civil Party Participation in Provisional Detention Appeals, *supra* note no. 121, at §§ 35-36. On the other hand, pursuant to Rule 74(4)(f) ECCC IR, civil parties may only appeal a Dismissal Order where the Co-Prosecutors have also appealed it.

¹⁵⁵ The Pre-Trial Chamber emphasised that 'civil parties have active rights to participate starting from the investigative stage of the procedure'. *Ibid.*, § 36.

¹⁵⁶ In this respect, the Pre-Trial Chamber noted that '[t]he Parties have different positions in the criminal proceedings and these positions even vary in the different stages of the proceedings. The Internal Rules contain certain rules which reflect those different positions'. See Decision on Preliminary Matters Raised by the Lawyers for the Civil Parties in Ieng Sary's Appeal Against Provisional Detention, *Ieng Sary*, PTC, 1 July 2008, §§ 3-4.

¹⁵⁷ Rule 24(7) ECCC IR.

¹⁵⁸ ECCC, Directions on Unrepresented Civil Parties' Rights to Address the Pre-Trial Chamber in Person, *supra* note no. 120, at § 8, citing ICC, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, *supra* note no. 114, at § 148.

¹⁵⁹ *Ibid.*, at §§ 128-131.

court at a scheduled hearing may only do so after making a written request ten days prior to the hearing, explaining the content and relevance of his or her proposed submission.¹⁶⁰

C. VICTIMS' RIGHTS AT THE STL

The governing rules of the Special Tribunal for Lebanon take into account some of the problematic issues that have arisen before the other courts under examination. The participation of victims in the investigation stage, hotly contested at the ICC, has been explicitly ruled out. Unlike the Lebanese Code of Criminal Procedure, which allows a victim to act as a civil party and to initiate a public action, the STL RPE do not allow victims to participate until the formal accusations against the person(s) accused have been confirmed.¹⁶¹ In accordance with Article 11 of the Statute, it is for the prosecutor, as a representative of the public interest, to decide *proprio motu* whether or not to start a criminal action in accordance with his chosen prosecution strategy. At most, victim may be allowed transmit to the prosecutor any information he considers useful to determine the truth. The prosecutor remains, however, free to decide how to use such information.

Following the confirmation of the indictment and prior to the start of the trial, the Pre-Trial Judge may decide to hear victims or invite the legal representative to file written submissions.¹⁶² Moreover, the RPE provide that the Pre-Trial Judge shall order the legal representative to file the list of witnesses that they intend to call and the list of exhibits they intend to submit as evidence.¹⁶³

5.3.3 *The Trial Stage*

This subsection explores the scope of victims' participatory rights at the trial phase of criminal proceedings carried out before the courts under examination. Whereas the governing rules of the ICC and the STL victims' participation schemes, unlike to the ECCC scheme, appear at first glance to provide only for a limited procedural status to victims, the implementation of these schemes by the chambers has considerably broadened the original scope. Victims have often been entitled to exercise rights which are statutorily granted only to parties (namely the prosecution and the defence). As such, it can be said that on a number of

¹⁶⁰ Note that the Chamber had initially recognised that civil parties might address the court in person when providing evidence, whether or not represented by a lawyer. ECCC, Decision on Preliminary Matters Raised by the Lawyers for the Civil Parties in Ieng Sary's Appeal Against Provisional Detention, *supra* note no. 156, § 5.

¹⁶¹ Article 17 STLSt., Rule 86(A) STL RPE.

¹⁶² Rule 89(D) STL RPE.

¹⁶³ Rule 91(H)(i) and (ii) STL RPE.

occasions the chambers have clearly sacrificed the rights of the accused (albeit, it can be argued, not to the level of seriously prejudicing them) in the name of a broader reading of victims' participatory rights. Arguably, a broad interpretation of victims' rights indicates, on the one hand, the recognition of the unique contribution that victims may provide to the establishment of the truth. On the other, such a broad interpretation may indicate that victims have a right to the prosecution of the offender ('right to justice').

The following sub-sections present this emerging approach which establishes a link between victims' participation and the realisation of truth and justice by analysing how the courts under examination have implemented the following rights: (i) the right to notification and access to filings; (ii) the right to present oral and written submissions; (iii) the right to question witnesses; (iv) the right to lead evidence; and (v) the right to ask for the amendment of the charges against the accused. References to the STL will be limited to the relevant legal provisions of the Statute and the Rules of Procedure and Evidence, as no case law has been rendered yet on victim's rights at the trial stage at the time of writing.

A. THE RIGHT TO NOTIFICATION AND ACCESS TO FILINGS

The right to notification and to access to filings is an essential element required to put victims in a position where they can fully exercise their rights at trial. Indeed, the effectiveness of victims' participation largely depends on the information to which they have access before the hearings. Such a right is recognised before all three courts under examination. Moreover, these courts have generally adopted a liberal approach in relation to victims' access to confidential materials submitted by the other parties. ICC Trial Chamber I, for instance, deemed that if confidential filings are of material relevance to victims' personal interests, consideration shall be given to providing relevant victims with access to them, subject to other protective measures that need to remain in place.¹⁶⁴ Similarly, the Trial Chamber in *Bemba* determined that in order to facilitate full participation by victims, those who have been granted the right to participate should have access to confidential material in the case, subject to restrictions as a result of protective measures and the security of individuals and organizations.¹⁶⁵ The Trial Chamber in *Katanga* also found that in order to promote effective participation, the legal representatives must be able to consult the confidential decisions and

¹⁶⁴ ICC, Decision on Victims' Participation, *supra* note no. 57, § 108.

¹⁶⁵ ICC, Decision on the Participation of Victims in the Trial and on 86 Applications by Victims to Participate in the Proceedings, *Bemba* (ICC-01/05-01/08-827), TC III, 30 June 2007, § 47.

documents in the record, with the exception of documents classified as *ex parte*, but restricted this right only to legal representatives and not to their clients.¹⁶⁶

A similar approach has been adopted by the Pre-Trial Judge of the Special Tribunal for Lebanon in his first decision on the forms of victims' participation in the pre-trial stage of the proceedings.¹⁶⁷ In that decision, the Judge granted victims' legal representatives access to confidential materials, as well as to indictment supporting materials and other disclosure materials. Access to these materials is automatic and only subject to the conditions that 'the security of individuals or organisations will not be adversely affected',¹⁶⁸ and that the legal representatives respect their ethical obligations by, *inter alia*, safeguarding the confidentiality of the materials.¹⁶⁹ Arguably, a similar approach will be adopted in the context of the trial stage before the Tribunal.

The access of victims to filings is potentially even broader before the ECCC. Indeed, once granted civil party status, victims at the ECCC have the same right to consult and examine the case file as all the other parties do, without the need to ask for the authorisation of the competent chamber. Such broad access, compatible with the civil law tradition which inspired the ECCC legal framework, has not been challenged until present.

B. THE RIGHT TO PRESENT ORAL AND WRITTEN SUBMISSIONS

All three courts under examination allow victims the opportunity to participate by way of both oral and written submissions. Through such submissions victims may comment on matters of admissibility and relevance of evidence¹⁷⁰ as well as upon a wide range of procedural matters¹⁷¹ provided that they can show personal interest in the issue at stake and that the manner in which they intervene is not prejudicial to the rights of the accused. Oral submissions may also include making opening and closing statements at trial.

¹⁶⁶ Decision on the Modalities of Victim Participation at Trial, *Katanga* (ICC-01/04-01/07-1788-t(ENG)), TC II, 22 January 2010, §§ 72-73.

¹⁶⁷ Decision on VPU's Access to Materials and the Modalities of Victims' Participation in Proceedings before the Pre-Trial Judge, *supra* note no. 106.

¹⁶⁸ *Ibid.*, § 55; see also Rule 133 STL RPE.

¹⁶⁹ *Ibid.*, § 56.

¹⁷⁰ Decision on Victims' Participation, *supra* note no. 57, § 114; Decision on the Modalities of Victim Participation at Trial, *supra* note no. 166, § 104; Decision on the Participation of Victims in the Trial and on 86 Applications by Victims to Participate in the Proceedings, *supra* note no. 165, §§ 29-31, citing Decision on Victims' Participation, *supra* note no. 57, and Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, *Lubanga* (ICC-01/04-01/06-1432), Appeals Chamber ('AC'), 11 July 2008, §§ 93-98.

¹⁷¹ For instance, in the *Katanga* case the Court authorised the victims to submit their views on issues such as the order of appearance of witnesses, hearsay, and the admissibility of evidence. See transcripts of 3 November 2009, at 27; 27 November 2009, at 23; 8 July 2010, at 38-41; 23 August 2010, at 52-56.

As noted above, it is primarily for victims' legal representatives to intervene in the course of the trial. When a significant number of victims participate in the proceedings allowing their direct intervention at hearings may unduly affect the efficiency and fairness of the trial. Trial Chamber I in *Lubanga* held that whereas Article 68(3) gives victims the statutory right to present their views and concerns when their personal interests are affected, it is generally for their legal representatives to undertake this task on their behalf.¹⁷² In this respect, it is interesting to note that many legal representatives have used the possibility to submit oral arguments, for instance in the form of opening statements, in order to emphasise the victims' right to truth and justice as well as the cathartic effect of victims' involvement in the proceedings.¹⁷³ Some of the legal representatives also referred to the individual criminal responsibility of the accused¹⁷⁴ in addition to referring to the harms suffered by the victims,¹⁷⁵ supporting in this way the arguments presented by the prosecution.

The possibility of authorising victims to directly present their views and concerns has not, however, been completely ruled out.¹⁷⁶ Trial Chamber II in *Katanga* stated that it would grant the legal representatives an opportunity to call victims to give evidence under oath at trial.¹⁷⁷ Such opportunity, however, is subject to the following limitations: (i) the defendant's right to be judged without undue delay is not prejudiced, (ii) victims must not in fact act as auxiliary prosecutors, and (iii) victims wishing to intervene in the hearings are not anonymous. Furthermore, victims' intervention (iv) should not cover issues which have already been discussed by the parties, (v) should be related with the facts under debate, (vi) should be representative of what happened to a significant group of victims, or add new information to the facts.¹⁷⁸ It is notable that when victims have been allowed to intervene in person in the hearings, rather than discussing the criteria for admission of evidence¹⁷⁹ the Court has analysed in detail the manner in which victims may contribute to the determination

¹⁷² Decision on Victims' Participation, *supra* note no. 57, §§ 115-116.

¹⁷³ *Lubanga*, transcripts of 26 January 2009, at 37-41 and 47-48; *Bemba*, transcripts of 22 November 2010, at 40-41.

¹⁷⁴ For instance, in *Lubanga*, one of the legal representatives affirmed that 'the responsibility of Thomas Lubanga Dyilo in particular should be recognized', see transcripts of 26 January 2009, at 55.

¹⁷⁵ *Ibid.*, at 45, 47, 49 and 52-54.

¹⁷⁶ ICC, Order Issuing Public Redacted Version of the "Decision on the Request by Victims a/0225/06, a/0229/06 and a/0270/07 to Express their Views and Concerns in Person and to Present Evidence During the Trial", *Lubanga* (ICC-01/04-01/06-2032), TC I, 9 July 2009.

¹⁷⁷ Decision on the Modalities of Victim Participation at Trial, *supra* note no. 166, at §§ 85-88.

¹⁷⁸ *Ibid.*, §§ 86-92.

¹⁷⁹ These criteria were set in the Decision on the Admissibility of Four Documents, *Lubanga* (ICC-01/04-01/06-1339), TC I, 13 June 2008, §§ 27-31.

of the truth.¹⁸⁰ Furthermore, victims have been called to testify as court witnesses and not as witnesses for the legal representatives of victims.¹⁸¹

Following the last amendments of the Internal Rules of the ECCC it would appear that civil parties do not have the right to directly make submissions before the Chambers during trial proceedings. Civil parties are required to participate through a common legal representative¹⁸² and it is very unlikely that the Chambers will leave room for individual civil parties' interventions. As such, the only option for civil parties to intervene in person remains that of testifying as witnesses. In this respect, the ECCC takes a completely different approach to the ICC. When a victim joins the proceedings as a civil party, he or she can no longer be questioned as a simple witness in the same case, and may only be interviewed under the same conditions as the accused.¹⁸³

This practice is in line with civil law criminal procedure. However, in most civil law jurisdictions a victim would testify first and then become a civil party.¹⁸⁴ This is not possible at the ECCC since civil party applications are required to be submitted before the start of the trial. Consequently, civil parties may only be interviewed during trial proceedings by the Lead Co-Counsel, if he or she decides to do so. In any case, civil parties are not enabled to provide sworn statements, as witnesses do, and the fact that they are authorised to attend all the hearings may somehow detract weight from their testimony.

C. THE RIGHT TO LEAD AND CHALLENGE EVIDENCE

Victims' participation in the trial process is beneficial for it offers victims a chance to ensure that the Court has an opportunity to hear facts from all of those directly affected by the crime,

¹⁸⁰ E.g., ICC, Decision on the Request by Victims a/0225/06, a/0229/06, and a/0270/07 to Express Their Views and Concerns in Person and to Present Evidence During the Trial, *Lubanga* (ICC-01/04-01/06-2032-Anx) TC I, 26 June 2009. In the Chamber's view, allowing the legal representatives of victims to propose the presentation of documentary evidence would indeed assist it in its implementation of Article 69(3) of the Statute, and by the same token in its search for the truth. *Ibid.*, at §§ 29-30.

¹⁸¹ Decision on Victims' Participation, *supra* note no. 57, at § 108.

¹⁸² Rule 23 ter ECCC IR.

¹⁸³ Rule 23(4) ECCC IR.

¹⁸⁴ See e.g. Art. 188 Draft Italian Code of Criminal Procedure (1978), which did not allow civil parties to testify. Note that, however, this provision was deleted in the last version of the Code (1988), since 'renouncing to the evidentiary contribution of civil parties would amount to a huge sacrifice in the search for judicial truth' ('La rinuncia al contributo probatorio della parte civile costituisce un sacrificio troppo grande nella ricerca della verità processuale'). See Relazione al progetto preliminare e al testo definitivo del codice di procedura penale Gazzetta Ufficiale n. 250 del 24 ottobre 1988, supplemento ordinario n. 93, at 62. See also Ordinanza n. 82/2004, Italian Constitutional Court, 23 February 2004.

not just from the defendant and the prosecution.¹⁸⁵ This also affects the way in which testimony may be manipulated and historical events may be tailored to the version of events that the parties wish to present to the bench.¹⁸⁶ For these reasons, the courts under examination have been unanimous in granting victims the possibility of leading and challenging evidence, even in the case, such as at the ICC, where such a right is statutorily granted only to parties (and not to participants).¹⁸⁷

In the context of the ICC, victims may lead evidence through the mediation of the judges. In its decision of 11 July 2008 in *Lubanga*, the Appeals Chamber underlined that ‘the right to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence lays primarily with the parties, namely, the Prosecutor and the Defence’,¹⁸⁸ and that the ‘regime for disclosure’ set forth in the ICC Rules is ‘directed towards the parties and not victims.’¹⁸⁹ Nevertheless, the Appeals Chamber found that victims could be authorised to lead evidence ‘where requested’ by the Chamber because the Rome Statute also empowers the Court to ‘request the submission of all evidence that it considers necessary for the determination of the truth.’¹⁹⁰ Requests by legal representatives for the introduction of elements of evidence not directly related to the culpability of the accused have been treated in a similar way.¹⁹¹

Accordingly, victims do not hold an absolute right to introduce evidence but may do so pursuant to Article 69(3) which gives the Chamber the power to ask for the introduction of evidence which it considers necessary for the determination of the truth.¹⁹² In this respect, it is noteworthy that on a number of occasions, victims have been able to tender and request

¹⁸⁵ M. Cohen, ‘Victims’ Participation Rights Within the International Criminal Court: A Critical Overview’, 37 *Denver Journal of International Law and Policy* (2009) 351-377, at 373; C. Jorda and J. de Hemptinne, ‘The Status and the Role of Victims’, *supra* note no. 23, at 1397.

¹⁸⁶ C. Stahn, H. Olasolo and K. Gibson, ‘Participation of Victims in the Pre-Trial Proceedings of the ICC’, 4 *JICJ* (2006) 219-238, at 224-226.

¹⁸⁷ Art. 69(3) ICCSt.

¹⁸⁸ Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, *supra* note no. 170, § 3.

¹⁸⁹ *Ibid.*, § 93.

¹⁹⁰ *Ibid.*, § 95.

¹⁹¹ ICC, Decision on the Request by the Legal Representative of Victims a/0001/06, a/0002/06, a/0003/06, a/0049/06, a/0007/08, a/0149/08, a/0155/07, a/0156/07, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0149/07 and a/0162/07 for Admission of the Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo as Evidence, *Lubanga* (ICC-01/04-01/06-2135), TC I, 22 September 2009, §§ 21-22.

¹⁹² ICC, Directions for the Conduct of the Proceedings and Testimony in Accordance with Rule 140, *Katanga* (ICC-01/04-01/07-1665-Corr.), TC II, 20 November 2009, §§ 45-48; Judgment on the Appeal of Mr Katanga against the Decision of Trial Chamber II of 22 January 2010 Entitled ‘Decision on the Modalities of Victim Participation at Trial’, *Katanga* (ICC-01/04-01/07-2288), AC, 16 July 2010, §§ 37-41.

evidence not only contributing to the determination of the truth but also relating to the guilt of the accused. A majority of the Appeals Chamber found that:

If victims were generally and under all circumstances precluded from tendering evidence relating to the guilt or innocence of the accused and from challenging the admissibility or relevance of evidence, their right to participate in the trial would potentially become ineffectual'.¹⁹³

Accordingly, the Court has regularly allowed victims' legal representatives to question witnesses on the guilt of the accused, linking such a right with assisting the Court to determine the truth.¹⁹⁴ Therefore, when questioning witnesses, victims' legal representatives have not confined their questions to the crimes and the harm suffered by their victims but have often attempted to establish the guilt of the accused, supporting the attempts of the prosecution.¹⁹⁵

Despite being fully under the control of the judges, the exercise of the right to lead evidence may risk seriously undermining the fairness of the trial. Victims are not parties of the proceedings and as such are not subject to any disclosure obligation prior to the commencement of the proceedings. In this respect, the Court held that the right to a fair trial, as interpreted by human rights courts, requires that the parties receive the evidence which victims want to present 'sufficiently in advance to allow them to prepare effectively'.¹⁹⁶ This is clearly a compromise: delays in the process of disclosure necessarily prejudice the possibility for the defendant to know from the very beginning the case against them. It remains true, however, that victims' right to introduce evidence has been conceptualised as a contribution towards the establishment of the truth, rather than as party-driven evidence. Consequently, its impact on the defendant's right is somewhat limited.¹⁹⁷

The liberal approach adopted by the Court with respect to the admission of evidence presented by the victims should not come as a surprise. Indeed, the ICC follows a trend observed in other international tribunals of broadly favouring the admissibility of all virtually

¹⁹³ Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, *supra* note no. 170, § 97.

¹⁹⁴ ICC, Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims, *Lubanga* (ICC-01/04-01/06-2127), TC I, 16 September 2009, § 27.

¹⁹⁵ For instance, legal representatives in *Lubanga* questioned witnesses on the funding of the UPC, in the attempt of linking *Lubanga* to such a financial support in order to help establish his role in the UPC structure. See e.g. *Lubanga*, transcripts of 12 February 2009, at 73.

¹⁹⁶ E.g., Decision on the Modalities of Victim Participation at Trial, *supra* note no. 166, §§ 105-107.

¹⁹⁷ The Appeals Chamber has recently ruled over the issue as to whether victims are under the same obligation as the parties to disclose exculpatory evidence. The answer has been negative. The obligation of the prosecution to disclose exculpatory evidence derives from his obligation to investigate in charge and in discharge. This obligation and its consequences cannot be extended to victims. Judgment on the Appeal of Mr Katanga against the Decision of Trial Chamber II of 22 January 2010 Entitled 'Decision on the Modalities of Victim Participation at Trial, *supra* note no. 192, at § 7.

relevant evidence.¹⁹⁸ This is so because international criminal tribunals operate on the assumption that professional judges, in contrast to a popular jury, are most capable of filtering out evidence which is not relevant, or not credible.¹⁹⁹ It may be observed that, in so doing, despite the fact that the ICC procedural model is still mostly adversarial (that is, essentially based on the confrontation of two parties) there is a tendency towards a judge-driven fact finding to which victims, through an enhanced procedural position, may contribute.

In principle, a similar procedure may arise before the Special Tribunal for Lebanon. Indeed, pursuant to Rule 87(B), victims participating in the proceedings may request the Trial Chamber to authorise the legal representative to call witnesses and tender additional evidence.

Consistent with the Cambodian criminal system - in which the ECCC procedural law is deeply rooted - all evidence is in principle admissible, unless otherwise decided by the competent chamber.²⁰⁰ During the trial, any party, including the civil parties, may make a request to submit new evidence by reasoned submission, and the chamber can grant the request if it is satisfied that this evidence was unavailable before the opening of trial, and that 'it deems conducive to ascertaining the truth'.²⁰¹

D. THE RIGHT TO QUESTION WITNESSES

The right to question witnesses gives victims the unique chance to 'tell the story' from their perspective, filling in the evidentiary gaps left by the prosecution, and promoting their interests. In the context of ICC proceedings, the recognition of victims' right to question witnesses has been largely uncontested by the parties, especially since specific measures have been adopted in order to limit the impact of such right on the fairness of the trial. Most importantly, the judges retain complete control of the exercise of this right: victims are required to submit a request in writing, indicating the questions that they wish to formulate. After receiving comments from the prosecutor and the defence, the competent chamber may authorise victims to question a witness, only (i) when the proposed questions have not been already submitted by the Prosecution, (ii) if the victims' personal interests are potentially affected by the answers of the witness, and (iii) if the rights of the accused are not

¹⁹⁸ T.M. Funk, *Victims' Rights and Advocacy at the International Criminal Court*, *supra* note no. 1, at 200-202.

¹⁹⁹ A. Orie, 'Accusatorial v. Inquisitorial in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings before the ICC', *supra* note no. 18, at 1485.

²⁰⁰ The Chamber may reject evidence where it finds that the evidence is irrelevant or repetitious, impossible to obtain within a reasonable time, unsuitable to prove the facts it purports to prove, not allowed under the law, or intended to prolong the proceedings or is frivolous (Rule 87(3) ECCC IR).

²⁰¹ Rule 55(5) ECCC IR.

prejudiced.²⁰² With regard to the last condition, the right to question witnesses has not been granted to anonymous victims, on the basis of the principle prohibiting anonymous accusation.²⁰³

As with the right to lead evidence, victims' right to question witnesses has been interpreted as contributing to the truth-finding process.²⁰⁴ This view has been explicitly supported by the chambers with respect to the manner of questioning of witnesses by legal representatives of victims pursuant to Rule 91(3). Trial Chamber I in *Lubanga* held that '[i]n the absence of any relevant provisions in the Rome Statute framework, the manner of questioning falls to be determined by the Chamber',²⁰⁵ and concluded that there is 'a presumption in favour of a *neutral* form of questioning, which may be displaced in favour of a more closed form of questioning, along with the use of leading or challenging questions, depending on the issues raised and the interests affected.'²⁰⁶ The Chamber held that if a legal representative of victims wishes to depart from a neutral type of questioning, an oral request should be made to the bench.²⁰⁷ Trial Chamber II in *Katanga* and Trial Chamber III in *Bemba* similarly held that a neutral style of questioning should be adopted, this being the best way to assist the judges in the search for the truth.²⁰⁸

In the context of the ECCC proceedings, civil parties' right to question witnesses has been interpreted in a rather ambivalent manner. On the one hand, the judges have found that civil parties are entitled to pose questions 'in support of the prosecution' (that is, as to contribute to the establishment of the guilt of the accused) as long as they are not repetitious, long-winded or outside the confines of the subject matter. On the other, the ECCC Trial Chamber found that civil parties are barred from questioning witnesses regarding the character of the accused.²⁰⁹ The Chamber, in particular, argued that victims do not have a

²⁰² Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims, *supra* note no. 194.

²⁰³ Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, *supra* note no. 113, at 8 and 9.

²⁰⁴ 'Under the scheme of the Statute, questioning by the victims' legal representatives has been linked in the jurisprudence of the Trial and the Appeals Chambers to a broader purpose, that of assisting the bench in its pursuit of the truth.' See Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims, *supra* note no. 194, at § 27.

²⁰⁵ *Ibid.*, at § 21.

²⁰⁶ *Ibid.*, at § 29.

²⁰⁷ *Ibid.*, at § 23.

²⁰⁸ Directions for the Conduct of the Proceedings and Testimony in Accordance with Rule 140, *supra* note no. 192, §§ 89-91; Decision on the Participation of Victims in the Trial and on 86 Applications by Victims to Participate in the Proceedings, *supra* note no. 165, §§ 38-40.

²⁰⁹ In his dissent, Judge Lavergne determined that Rule 23 ECCC IR allows victims to participate at all stages of the proceedings, and unless the IRs explicitly exclude Civil Parties from participating or places restrictions on their rights, it must be assumed that Civil Parties have the same rights and obligations as other parties. Specific restrictions, including the ones in rules 89bis and 82(3) are explicitly set out. See Dissenting Opinion of Judge

right to question witnesses on issues related to the accused's character because character evidence is only relevant to sentencing and has no relevance towards the guilt of the accused or reparations. The Chamber held, quite remarkably, that despite the fact civil parties are entitled to support the prosecution in establishing the guilt of the accused, since this creates the foundation for their successive claim for reparation, the rules of the Chambers do not 'confer a general right of equal participation with the Co-Prosecutors'.²¹⁰ This is so also due to the fact that the accused's right to a fair trial includes, according to the Chamber, the right to face only one prosecuting authority.²¹¹

Although this last assertion may be questioned (it is a matter of fact that in criminal proceedings where civil parties join the prosecution the defendant faces multiple accusers) the reasoning of the Court appears reasonable in light of the crimes within its jurisdiction. Given that the ECCC was the first international tribunal to allow for such comprehensive participation of civil parties, it is hardly surprising that the court inevitably ran into several challenges in managing their presence. The pure form of civil party participation as found in the Cambodian and French civil law systems is inadequate to fully address the unique elements that occur in trials of international crimes. For example, a typical criminal trial involves no more than a few victims whereas trials of international crimes can have thousands of victims eligible for participation in the proceedings. This can place a heavy burden on the court as such, particularly on the defence, and has the unintended effect of unnecessarily prolonging the proceedings, making it more difficult to achieve fair and timely justice. The increasing limitation of civil parties' rights thus appears to be a necessary compromise dictated by the unique character of the Cambodian tribunal.

Lavergne, Decision on Civil Party Co-Lawyers' Joint Request for a Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character, *Duch*, TC, 9 October 2009, at §§ 12-15. He further took issue with the inconsistency between this decision and practice during the hearings, and noted that '[i]n practice, the Civil Parties have indeed, on numerous occasions, been allowed, up to now, to put questions on character both to the Accused and to witnesses and experts, be they direct witnesses to the events included in the Indictment or witnesses who were expected to help put these events in their historical and personal context.' *Ibid.*, § 25.

²¹⁰ ECCC, Decision on Civil Party Co-Lawyers' Joint Request for a Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character, *supra* note no. 209, § 25.

²¹¹ *Ibid.*, § 26.

E. THE RIGHT TO ASK FOR THE AMENDMENT OF THE CHARGES AGAINST THE ACCUSED PERSON

The right to ask for the amendment of charges against the accused is not provided for in the legal framework of the courts under examination. Nonetheless, this issue has generated interesting case law in the *Lubanga* case. Indeed in that case victims, through their common legal representatives, requested reconsideration of the legal characterization of facts charged against Lubanga as sexual slavery and cruel and/or inhuman treatment, and not just as enlisting or recruiting children for the purpose of using them to participate actively in hostilities.²¹² In a divided decision, Trial Chamber I notified the parties and the participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court,²¹³ when the ““additional facts” ... have come to light during the trial and build a unity, from the procedural point of view, with the course of events described in the charges’.”²¹⁴

According to the majority, Trial Chamber I had come to know several elements of evidence that girls younger than fifteen belonging to the armed group allegedly under Lubanga’s command were subject to sexual abuse. Furthermore, the Chamber found that the training to which children were submitted could amount to cruel and inhuman treatment. The Appeals Chamber, however, unanimously reversed this decision, holding that, whereas a legal re-characterisation of the facts is not inconsistent with the Rome Statute, in line with general principles of international law or even the rights of the accused, a re-characterisation should not exceed the facts contained in the charges or amendments thereto.²¹⁵

Although the victims’ request was eventually rejected, this debate has the merits of showing that the exercise of victims’ procedural rights may give the judges elements to evaluate the validity of prosecutorial decisions, and permit victims to express their personal interests even when they do not correspond with those of the prosecution (in this case by

²¹² ICC, Demande conjointe des représentants légaux des victimes aux fins de mise en oeuvre de la procédure en vertu de la norme 55 du Règlement de la Cour, *Lubanga* (ICC-01/04-01/06-1891), Legal Representatives of Victims, 22 May 2009.

²¹³ ICC, Decision Giving Notice to the Parties and Participants that the Legal Characterization of the Fact May Be Subject to Change in Accordance with Regulation 55(2), *Lubanga* (ICC-01/04-01/06-2049), TC I, 14 July 2009.

²¹⁴ ICC, Clarification and Further Guidance to Parties and Participants to the ‘Decision Giving Notice to the Parties and Participants that the Legal Characterization of the Fact May Be Subject to Change in Accordance with Regulation 55(2)’, *Lubanga* (ICC-01/04-01/06-2093), TC I, 27 August 2009, § 8.

²¹⁵ ICC, Judgment on the Appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I Entitled “Decision Giving Notice to the Parties and Participants that the Legal Characterization of the Fact May Be Subject to Change in Accordance with Regulation 55(2)”, *Lubanga* (ICC-01/04-01/06-2205), AC, 8 December 2009. See also the subsequent TC’s reconsideration, Decision on the Legal Representatives’ Joint Submission Concerning the Appeals Chamber’s Decision on 8 December 2009 on Regulation 55 of the Regulations of the Court, *Lubanga* (ICC-01/04-01/06-2223), TC I, 8 January 2010, § 28.

questioning the opportunity of the decision of the prosecutor to limit the charges against Lubanga to the crime of enlisting or recruiting child soldiers). On the other hand, despite the simmering frustration that victims' groups have felt with the limited scope of the charges against Lubanga, the Appeals Chamber has made clear that Regulation 55 may not be used to circumvent the charging document.

5.3.4 *Victims' Rights at the Sentencing Stage*

In determining the appropriate sentence for a person who has been found guilty two of the courts under examination, the ICC and the STL, provide victims with a right to address the court in writing or in person regarding the impact of the crime of which that person has been convicted. In accordance with Rule 143 of the ICC RPE victims may request an additional hearing on issues related to sentencing in which they can participate. In addition to oral interventions, victims' legal representatives may submit victim impact statements to the court. At the discretion of the Court, victim impact statements may not only include the impact of the crime on the victims and their families but also their view on what should be done with regard to addressing the harm suffered, potentially including a sentencing recommendation. Similarly, Rule 87(c) of the STL Rules of Procedure and Evidence establishes that 'a victim participating in the proceedings may be heard by the Trial Chamber or file written submissions relating to the personal impact of the crimes on them'.

On the contrary, civil parties at the ECCC have no standing to make any submissions related to sentencing as sentencing is considered to be an exclusive prerogative of the prosecutor. In particular, the Trial Chamber has directed civil parties to refrain from making any submissions relating to sentencing or any factors underlying a decision on sentencing.²¹⁶ These decisions come as no surprise given the fact that the court, as observed above, has declined to hear testimony on the character of the accused.

²¹⁶ ECCC, *Duch*, transcripts of 27 August 2009, at 41-42.

6 OTHER ELEMENTS SUPPORTING VICTIM'S RIGHT TO JUSTICE BEFORE INTERNATIONAL AND INTERNATIONALIZED CRIMINAL TRIBUNALS

The previous section has shown that victims have been empowered to exercise a number of procedural rights in the course of proceedings of international and internationalized criminal tribunals. Whilst somewhat limited in scope, these procedural rights give victims the possibility of influencing the decision-making process and are not limited to their claim for reparation. As such, victims' participatory rights are linked to the protection and promotion of victim's right to justice. This argument, as has been observed above, has been repeatedly recognised by the courts and tribunals under examination.

As the following subsections will discuss, the recent practice of these bodies offers two further elements in support of a victim's right to justice: (i) the prosecution and punishment of those responsible for international crimes have been read as an element of victims' reparation; and (ii) the courts under examination are increasingly emphasising the need to effectively realise victims' participatory rights in the proceedings.

6.1 Victims' Right to Justice as an Integral Element of Reparation

Whereas victims' redress is normally associated with restitution and material compensation, the thesis in Chapter III attempted to demonstrate that justice, in the sense of criminal prosecution and punishment of perpetrators, is paramount to victims' right to remedy in cases of gross violations of human rights amounting to international crimes. The previous sections of this Chapter have shown how victims have been gradually endowed with procedural rights in criminal proceedings before international and internationalized criminal tribunals to protect and promote their right to justice.

The fact that victims of international crimes have a right to justice, understood as the right to the determination of the individual responsibility for the crimes they suffered from, may also be derived from victim's right to reparation, as has also been established under international human rights law. Notably, provisions on reparation under the ICC and the ECCC do not make explicit mention to the accountability of the offender as a form of reparation. Article 75 of the ICC Statute, for instance, does not list it as a form of reparation, referring only to 'restitution, compensation and rehabilitation' although this list is generally

recognised as not being exhaustive.²¹⁷ A similar interpretation may be given to Rule 23 *quinqüies* (1) of the ECCC Internal Rules, which provides that the Chambers may award only ‘collective and moral reparations’, leaving open the possibility of awarding satisfaction as a form of reparation, including the prosecution and punishment of perpetrators. This interpretation would also be supported by provisions of the ICC Statute and the ECCC Internal Rules which demand that these instruments be applied and interpreted in conformity with human rights standards.²¹⁸

The ICC confirmed that victims’ right to justice is an integral component of the right to reparation in its first decision on the principles of reparation in the *Lubanga* case. In this decision, the Trial Chamber substantially upheld the proposal submitted by the Registry for a ‘moral reparation’ programme where the judgment constitutes a form of reparation in itself.²¹⁹ This proposal also had the support of the Office of the Prosecutor.²²⁰ Relying on the case law of the Inter-American Court of Human Rights the Chamber affirmed: ‘The conviction and the sentence of the Court are examples of reparations, given that they are likely to have significance for the victims, their families and communities.’²²¹

In this sense, the Court appears to confirm what has been increasingly demanded by international human rights bodies as an imperative remedy in cases of gross human rights violations, namely victims’ right to justice. Needless to say, this is a groundbreaking ruling in the context of international criminal justice and it is quite significant that the ICC judges chose to include it in the first, long-awaited, decision on reparations adopted by the Court. Although this decision is binding only in relation to the *Lubanga* case it will most likely influence similar decisions to be taken in the other cases before the Court.

No such finding was made by the ECCC in its first judgment on reparation, issued in the *Duch* case,²²² or in the appeal judgment.²²³ Nevertheless, at least indirectly, the Appeals Chamber recognised the importance of satisfaction as a measure of reparation for international crimes, in conformity with human rights standards, and in particular of the individual responsibility of perpetrators. Relying on the UN Basic Principles on Reparation of

²¹⁷ Art. 75(1) ICCSt. provides that ‘The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.’ (emphasis added). This view has been confirmed by the Trial Chamber in the *Lubanga* case, see Decision Establishing the Principles and Procedures to Be Applied to Reparations, *supra* note no. 66, § 222.

²¹⁸ See art. 21(3) ICCSt.; art. 20 of the Law On The Establishment of the ECCC.

²¹⁹ ICC, Second Report of the Registry on Reparations, *Lubanga* (ICC-01/04-01/06-2806), Registry, 1 September 2011, §§ 76-81.

²²⁰ Decision Establishing the Principles and Procedures to Be Applied to Reparations, *supra* note no. 66, § 110.

²²¹ *Ibid.*, § 237.

²²² ECCC, Judgment, *Duch*, TC, 26 July 2010.

²²³ ECCC, Appeal Judgment, *Duch*, AC, 3 February 2012.

2005, the Appeals Chamber acknowledged that ‘reparations encompass satisfaction measures such as public apologies, including acknowledgement of the facts and acceptance of responsibility.’²²⁴

6.2 A Shift in Focus: From Fairness to Effectiveness

The idea that victims not only have a legitimate interest in the prosecution of perpetrators, but a right to it, is also supported by the fact that courts under examination are increasingly emphasising the need to effectively realise victims’ rights in the proceedings. Arguably, the ‘effectiveness’ requirement (associated in international human rights law with the right to remedy)²²⁵ indicates that certain victims’ rights in the proceedings are more than simply ‘fair trial rights’ for victims which, as such, may be counterbalanced with the fair trial rights of the accused. Rather, as indicated in the practice analysed above, victims’ participation rights are linked to the realisation of the right to truth and justice which, in turn, are integral elements of the right to reparation.

From the above analysis, it has emerged that the ideal model of victims’ participation remains at present a work in progress. This is so because a great deal of discretion is left to the judges to determine how and when victims may exercise their right to participate. Not unexpectedly, victims’ participatory rights have been the subject of a considerable amount of the jurisprudence of these courts. An analysis of the early case law reveals, in particular, that the need to ensure the fair trial rights of the defendants has been the primary consideration of these courts when considering the implementation of victims’ rights in the proceedings.²²⁶

Concerns over fair trial rights have led these courts to adopt a restrictive interpretation of the participatory rights systems. For instance, the Appeals Chamber of the ICC has on several occasions overruled the liberal approach of the Pre-Trial Chambers on the participation of victims at the investigation stage on a situation.²²⁷ The ECCC have found that civil parties are not permitted to make submissions relevant to sentencing or to question

²²⁴ *Ibid.*, § 675.

²²⁵ See Chapter I, Section 3.

²²⁶ The need to ensure the fair trial rights of the accused is explicitly set out in the statutory rules on victims’ participation. See on this issue S. Zappalà, ‘The Rights of Victims v. the Rights of the Accused’, *supra* note no. 45.

²²⁷ See e.g., Judgment on Victims Participation in the Investigation Stage of the Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor against the Decision of Pre-Trial Chamber I of 24 December 2007, *supra* note no. 142, §§ 45-59; Judgment on Victims Participation in the Investigation Stage of the Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 3 December 2007 and in the Appeals of the OPCD and the Prosecutor against the Decision of Pre-Trial Chamber I of 6 December 2007, *Situation in Darfur* (ICC-02/05-177), AC, 2 February 2009, § 7.

witnesses regarding the character of the accused.²²⁸ The Chamber held in this respect that, despite the fact that civil parties are entitled to support the prosecution in establishing the guilt of the accused (since this creates the legal basis for their subsequent claim for reparation) the rules of the ECCC do ‘not confer a general right of equal participation with the Co-Prosecutors’.²²⁹ This is so due to the fact the accused’s right to a fair trial includes, according to the Chamber, the right to face only one prosecuting authority.

Notwithstanding the crucial importance of ensuring that the maximum standards of fair trial rights are applied by international criminal jurisdictions, a recent trend can be observed in favour of a shift in emphasis towards the need to guarantee the effectiveness of victims’ participation in the proceedings. A clear example of this shift in focus is the issue of the victims’ access to confidential material. This is a particularly sensitive matter in the pre-trial phase as the majority of documents submitted by the parties at this stage of the proceedings are confidential, and as such, denying the access of victims would significantly impair their effective participation in the subsequent phases.

This question has been much debated before the ICC and a consistent approach has not emerged so far. Rather, three positions can be identified: (i) victims are granted access to public filings only, hence they are automatically denied access to confidential materials;²³⁰ (ii) victims are granted limited access to confidential documents, as decided by the competent chamber on a case by case basis;²³¹ or (iii) victims are granted unlimited access to confidential materials.²³² With respect to the latter approach, namely that victims have access to all documents in the record of the case, including those of confidential nature, Single Judge Steiner observed that since ‘the bulk of the evidence filed by the Prosecution and the Defence in the record of the respective cases has been classified as confidential ... if victims were to be denied access to confidential filings, they would essentially be prevented from *effectively participating* in the evidentiary debate held at the confirmation hearing.’²³³

²²⁸ ECCC, Decision on Civil Party Co-Lawyers’ Joint Request for a Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character, *supra* note no. 209.

²²⁹ *Ibid.*, § 25.

²³⁰ Decision on Victims’ Participation, *supra* note no. 57, § 106.

²³¹ ICC, Judgment Pursuant to Article 74 of the Statute, *Lubanga* (ICC-01/04-01/06-2842), TC I, 14 March 2012, § 14 (vi); Decision on the Request for Access to Confidential Inter Partes Material, *supra* note no. 145, §§ 12-13.

²³² Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, *supra* note no. 114, § 128; Decision on the Modalities of Victim Participation at Trial, *supra* note no. 166, § 121.

²³³ Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, *supra* note no. 114, § 151 (emphasis added).

This line of argument was recently upheld by the STL Pre-Trial Judge in the first decision on the form of victims' participation in the pre-trial stage of the proceedings.²³⁴ In that decision, the Judge granted victims' legal representatives access to confidential materials as well as to indictment supporting materials and other disclosure materials. Access to these materials is automatic and only subject to the conditions that 'the security of individuals or organisations will not be adversely affected',²³⁵ and that the legal representatives respect their ethical obligations by, *inter alia*, safeguarding the confidentiality of the materials.²³⁶ Like that of the ICC Single Judge, the STL Pre-Trial Judge's decision focuses on the need to ensure that the legal representatives carry out their mandate and, more specifically, that they are able to perform their duties and '*meaningfully* participate on behalf of victims'.²³⁷

Two aspects of this decision in particular are noteworthy. Firstly, this ruling weakens the significance of the distinction between parties and participants. While access to the indictment supporting materials is normally a prerogative of the parties (and not of the victims and their legal representatives) the STL Judge observed that such access is necessary for the participation of the victims to be effective.²³⁸ Secondly, with the objective of guaranteeing effective participation by victims (through their legal representatives), the Judge also established that access to these documents should take place before the case file is transmitted to the Trial Chamber, and not at the moment of the transmission, as instead set out in Rule 87(A) of the STL Rules of Procedure and Evidence.²³⁹

In sum, a number of recent decisions of various international courts and tribunals show that victims' participatory rights are increasingly being interpreted with a view to ensuring their effectiveness and not only their compatibility with the fair trial rights of the accused.

However, the recent focus on the effectiveness of victims' participation raises concerns with respect to the fair trial rights of the accused. Has the effectiveness of victims' rights been affirmed at the expense of fairness of the trial? Much has been written on the impact of victims' participation on the fairness of trials before international criminal tribunals. It goes without saying that the introduction of an additional party in the trial necessarily creates extra costs and burdens on the proceedings which could directly impinge on the

²³⁴ STL, Decision on VPU's Access to Materials and the Modalities of Victims' Participation in Proceedings before the Pre-Trial Judge, *supra* note no. 106.

²³⁵ *Ibid.*, § 55; see also Rule 133 STL RPE.

²³⁶ *Ibid.*, § 56.

²³⁷ *Ibid.*, §§ 50-53, emphasis added.

²³⁸ *Ibid.*, §§ 71-73.

²³⁹ *Ibid.*, § 77.

efficiency of the trial itself. Furthermore, one may argue that full participation of victims in the proceedings may affect equality of arms and interfere with the accused's presumption of innocence.

It is a matter of fact, however, that victims' participation is a statutory right which, as such, has not been considered by the drafters and by the judges as incompatible with fair trial rights. This does not mean that victims' participation must be enforced at all costs. Rather, the provisions on victims' participation before the courts at issue explicitly establish that this right shall not be exercised in a manner that is prejudicial to the fair trial rights of the accused. In this regard, it is worthwhile noting that the progressive deepening of victims' participation, to the extent of ensuring its effectiveness, has corresponded with a substantive transformation of the forms of participation in order to safeguard both the efficiency of proceedings and, more generally, their fairness.

First, victims' participation before international criminal tribunals has been implemented predominantly in a vicarious way. Although victims' participatory schemes established within these courts give victims the right to present their views and concerns, it is generally for their legal representatives to undertake this task on their behalf. Most importantly, certain rights, those most likely to affect the rights of the accused, are only granted to victims' legal representatives in view of the fact that as professional counsel they have both the skills and the ethical obligations to duly exercise them. This has been the case, for example, in the STL decision mentioned above in relation to access to confidential documents. In the same vein, the ECCC Pre-Trial Chamber found that, in order to balance the rights of all parties, the participation of a legitimately unrepresented civil party might be more limited than that of a represented civil party.²⁴⁰

Second, the widening of victims' participation has been also paralleled by the increasing attempt to consider victims' rights collectively. The process of considering victims' rights collectively has two components. On the one hand, while victims are in principle free to choose a legal representative, all three courts under examination have assigned common legal representatives to groups of victims.²⁴¹ On the other hand, recent pronouncements before the ICC suggest that the entire procedure of victims' applications for participation may be collectivised. Two single judges have mandated the Victims

²⁴⁰ Decision on Preliminary Matters Raised by the Lawyers for the Civil Parties in Ieng Sary's Appeal Against Provisional Detention, *supra* note no. 156, § 5.

²⁴¹ ICC, Second Decision on Issues Related to the Victims' Application Process, *Gbagbo* (ICC-02/11-01/11-86), PTC I, 5 April 2012.

Participation and Reparation Section with drafting a collective application form for victims in the *Gbagbo* case and in the proceedings related to the situation in Uganda.²⁴²

The proposal for a collective application form is consistent with the practice requiring victims to participate through common legal representatives rather than through their own counsel,²⁴³ and it potentially contributes to the effective management of victims' participation. Furthermore, the idea of a collective access to proceedings appears to be particularly apt in view of the forms of reparation available to victims. The ECCC Internal Rules, for example, only allow for collective and moral forms of reparation.²⁴⁴ Likewise, the abovementioned ICC decision on the principles and practices of reparation indicated that reparation to be made through the Trust Fund for Victims will 'tend to be collective in nature ... given the limited funds available and the fact that this approach does not require costly and resource-intensive verification procedures'.²⁴⁵

²⁴² ICC, Decision on Victims' Participation in Proceedings Related to the Situation of Uganda, *Situation in Uganda* (ICC-02/04-191), PTC II, 9 March 2012, § 22.

²⁴³ Rule 90(2) ICC RPE.

²⁴⁴ Article 23(1)(b) ECCC IR.

²⁴⁵ Decision Establishing the Principles and Procedures to Be Applied to Reparations, *supra* note no. 66, § 274.

7 CONCLUDING REMARKS

In the preceding chapters it has been argued that justice, in the sense of criminal prosecution and punishment of perpetrators, is paramount to victims' right to remedy in cases of gross violations of human rights. The progressive development of a victim's right to justice has led to a reconsideration of the role of victims in criminal proceedings. Efforts to codify victims' participatory rights in the criminal process have taken place throughout the last few decades at both the regional and international level. Notwithstanding the fact these instruments represent a compromise between the wide variance of procedural models of the states, a general consensus seems to have emerged that victims should be granted a minimum core of rights to participate in the proceedings in order to enforce their right to justice.

From this perspective, the incorporation of victim participatory regimes within recently established international criminal tribunals, described in this Chapter, appears to be consistent with human rights standards that have emerged in relation to victims' redress for gross violations of human rights. In particular, this Chapter has shown that three main elements of these victims' redress regime support this position: (i) victims' participatory rights have been interpreted as being linked to the realisation of their right to justice; (ii) prosecution of perpetrators has been explicitly recognised as a form of reparation; and (iii) courts have progressively emphasised the need to effectively enforce victims' participatory rights.

Accordingly, international and internationalised criminal tribunals are moving away from their traditional mandate of solely adjudicating international crimes. Today they can also be considered as mechanisms to enforce human rights and in particular the rights of those who have been harmed by the crimes under their review. On the whole, the practice of international criminal tribunals contributes to the development, also at the international level, of a legal principle that a victim's remedy encompasses the identification, prosecution and punishment of the wrongdoers as well as the access of victims to the procedure establishing criminal responsibility for the violations.

However, the practice of international criminal tribunals has not only contributed to the emergence of a legal principle. It also potentially offers an indication of how to foster the realisation of victims' right to justice at the domestic level. Indeed, the courts under examination provide for a defined system of victims' participatory rights and have elaborated considerable practice on how to implement such rights whilst ensuring the fairness and effectiveness of the proceedings, also in adversarial proceedings, such as at the ICC. This

practice is all the more relevant if one considers that domestic criminal systems are increasingly being asked to set out procedures to accommodate victims' rights in criminal trials, as observed in Chapter V. Furthermore, since international criminal tribunals only deal with a small portion of perpetrators of international crimes, it is crucial that domestic criminal tribunals are equally able to provide justice to victims.

Conclusions

1 THE OBJECT OF THIS STUDY

This thesis has examined whether a right to justice, understood as the right to the determination of the individual criminal responsibility of wrongdoers, is emerging in international law for victims of gross human rights violations and international crimes. The subject of this thesis has been chosen in view of the significant developments that have occurred in the past few decades at both the national and international level in relation to victims' rights and in light of the growing attention that has been paid to the concept of 'bringing justice to victims'. The question arises as to whether the criminal prosecution of wrongdoers can be correctly conceptualised as an individual right and, if so, what the implications of the existence of such a right are, particularly in terms of victims' rights in criminal proceedings.

The starting point of this analysis was the gradual development of a *distinct redress regime* in cases of gross violations of human rights and international crimes. Whereas traditionally restitution and monetary compensation have been the most common remedies granted to victims, the adequacy of such forms of reparation has been increasingly challenged in cases of gross human rights violations. The perception of such remedies as inadequate is a result of the gravity, and in some cases of the irreparability, of the harm suffered as a consequence of these violations. In this regard a trend can be detected in the law and practice of international human rights law where a distinct redress regime for victims of gross human rights violations has emerged. This distinct redress regime encompasses the performance of obligations which satisfy the needs and expectations of victims in the aftermath of gross violations.

The growing awareness that justice matters to victims has brought about a gradual reconsideration of the types of remedies that victims of certain serious violations should be granted. Recent human rights practice and jurisprudence increasingly appear to support the view that the prosecution of alleged wrongdoers is an imperative remedy in the aftermath of gross violations of human rights. A crucial shift in rationale is implied in this emerging trend. Indeed, the prosecution of wrongdoers been long framed as an objective duty of general human rights protection. Nonetheless, the decisions of treaty-based human rights bodies and the provisions of binding and non-binding international human rights documents have evolved to consider effective prosecutions as a component of the remedy that states must

guarantee victims of gross human rights violations. States not only have a duty to the public but also to the victims to prosecute gross human rights abuses. The development of this practice seems to justify the emergence of a victim's right to justice for serious human rights violations, which coexists with the relevant state's duty to prosecute.

The framing of criminal justice as a victim's right raises a number of legal issues that have been addressed throughout this research project, particularly: (i) what the scope and content of victim's right to justice are; (ii) what the impact of the development of victims' right to justice on the duty to prosecute is; and (iii) whether the effective exercise of victim's right to justice entails that victims be entitled to exercise certain rights in the criminal process.

In order to answer these questions, this study has taken into account international human rights law and practice, comparative criminal law, as well as the theory, law and practice of international and internationalized criminal tribunals. The main findings of this study will be summarised in the following sections.

2 THE PROSECUTION OF ALLEGED HUMAN RIGHTS OFFENDERS AS AN IMPERATIVE REMEDY FOR VICTIMS OF GROSS HUMAN RIGHTS VIOLATIONS

The analysis carried out in this work has demonstrated that the contents of victim's right to reparation may vary considerably according to the type the violation suffered. Although the principle of *restitutio in integrum* acts as a reference rule, in the context of gross violations of human rights it may often be impossible to undo the harm suffered by victims or restitution may even produce undesirable results. Furthermore, compensation alone has often been considered inadequate to repair the harm suffered. For these reasons, it has been argued that a distinct redress regime has developed for this type of violations (Chapter I).

The types of reparation appropriate to remedy gross human rights violations will differ depending on the circumstances of the case, ranging from compensation for material and immaterial damage to symbolic measures such as the establishment of the truth, the public acknowledgment of the wrongfulness character of the fact or the memorialisation of the victims. This thesis has, however, shown that prosecution of alleged human rights offenders is increasingly considered as an *imperative remedy* in cases of serious breaches of human rights, including violations of the right to life and to physical integrity (Chapter III).

In particular, in the event of serious breaches of human rights, the view of human rights supervisory bodies is that victims' right to remedy cannot be adequately satisfied

through disciplinary and administrative measures alone. Similarly, the opportunity to seek damages in civil litigation alone, in the absence of the criminal conviction of the offender, has not been considered a sufficient avenue of redress. Accordingly, these bodies are unanimous in holding that victims' right to remedy entails the right to have alleged human rights offenders brought to justice. In other words, victims' right to justice is considered an integral component of the right to an effective remedy in cases of gross human rights violations. This view is also supported by provisions in binding and non-binding international human rights documents.

Framing criminal justice as a victim's right implies a crucial shift in rationale. Indeed, the prosecution of human rights offenders has traditionally been considered as a duty of states to ensure general human rights protection. Recent human rights law and practice indicates that the traditional concept of prosecution is broadening its scope: criminal measures not only re-establish the validity of a right in principle and act as a deterrent against further abuses, but also acknowledge the suffering of victims and condemn the injustice they suffered. From this perspective, investigations and prosecutions act as a form of reparation because they restore the dignity of the deceased and grant consolation and closure to the survivors of the tragedy. As such, the development of this practice seems to justify the emergence of a victim's right to justice for serious human rights violations which coexists with the relevant state's duty to prosecute these violations.

The analysis carried out in this thesis has demonstrated that reading criminal justice as a victim's right has important consequences. A major consequence of the development of victim's right to justice is its impact on the scope of the corresponding state's duty to prosecute human rights violations. It has been argued that conceiving such a duty in the general pursuit of the overall protection of human rights, as it was traditionally done by human rights bodies, subjects the duty itself to an inherent limitation. This inherent limitation is that while the state remains under the obligation to criminalise serious violations of human rights, as well as to establish effective law-enforcement machinery, deviation from the duty to prosecute may be allowed if this would better serve the general enjoyment of human rights. Conversely, if criminal accountability of human rights offenders is also considered as a duty owed to victims, there is virtually no room to argue that it can be compromised in favour of the general protection of human rights.

This argument has been supported by the analysis of both domestic and international law and practice which indicates that in cases of international crimes and gross human rights violations bars to prosecution, such as the immunity of state officials from foreign criminal

jurisdictions, amnesty laws, statutory limitations and the principle of non-retroactivity of criminal law, have been either limited in scope or removed altogether (Chapter IV). In particular, it has been shown that the validity of obstacles to prosecution has been progressively reduced in view of the fact that they have been found in violation of the right to an effective remedy for victims. From this perspective, the progressive outlawing of obstacles to prosecution can also be viewed as supporting the position that a right to justice, understood as a right to the prosecution of offenders, is emerging as an integral component of a victim's right to an effective remedy. Furthermore, the emergence of remedy as a rationale for prosecution and punishment potentially contributes more effectively to the fight against impunity, as the traditional obstacles to prosecution are increasingly set aside and justice is in turn allowed to run its course, both to meet the demands of the victims and to reaffirm universal values.

3 HALF-JUSTICE IS NO JUSTICE? THE LACK OF VICTIM'S PARTICIPATORY RIGHTS IN CRIMINAL PROCEEDINGS

Reading criminal justice into victims' rights invites a reconsideration of the role and the rights of victims in criminal proceedings. It has been argued that if victims have a right to the prosecution of human rights offenders as an integral component of their right to remedy, it would seem legitimate to assert that they should also be granted corresponding procedural rights in the criminal process.

Through an extensive review of international legal instruments and practice and a comparative analysis of domestic criminal justice systems, this study has demonstrated that in the last few decades the role of victims and the rights they possess in criminal proceedings has considerably expanded (Chapter V). From the analysis undertaken in this study it appears that the practice of human rights supervisory bodies and a number of legal instruments adopted at the international level have begun to recognise that victims should be entitled to exercise a series of rights in criminal proceedings before domestic courts, especially in cases of gross human rights violations. Similarly, the comparative study of a number of domestic criminal systems has indicated that measures have been adopted in several domestic jurisdictions aimed at enhancing the protection of victims' interests in criminal proceedings.

Nevertheless, the affirmation of a victim's 'right to participation' in criminal proceedings remains, at present, extremely vague. Although international instruments now

require the interests of victims to be taken into account in a variety of ways, these documents do not stipulate specific requirements concerning the role victims ought to play in criminal proceedings. While centring around the idea that some mechanisms have to be set up to allow the views and concerns of victims to be heard, most of these instruments are formulated in a vague or non-prescriptive manner and do not detail how victims' rights are to be realised in practice. Likewise, human rights supervisory bodies have refrained from recognising that victims should be granted a specific set of participatory rights in criminal proceedings. The review of these bodies' practice revealed on the one hand increasing consideration of the need to ensure that victims are involved in criminal proceedings to the extent of securing their interests and on the other, that so far these bodies have not recognised that victims have an absolute right to participate in criminal proceedings, nor that their right to justice entitles them to specific participatory rights if the relevant domestic law does not provide for such rights.

It has been argued that this cautious approach may be justified primarily in view of the intrinsic differences between the various criminal law systems of states in relation to the role of victims in the proceedings. In particular, this thesis has shown that even though there is a movement signalling that the private interests of victims should be considered together with public interest in criminal trials, the extent to which the adversarial paradigm can effectively accommodate victims' rights remains inherently limited, due to the predominantly bipolar structure of adversarial trials.

Therefore, in light of the analysis carried out in this thesis, it is not possible to determine that a set of procedural rights is attached to victims' right to justice, as has been initially hypothesised. However, the fact that victim's participation is enshrined as a value in a number of international documents and decisions, and given the progressive introduction of victims' participatory rights in domestic criminal systems (particularly in case of serious crimes), shows that there is undoubtedly increasing acceptance of the need to take into account victims' views and concerns. Furthermore, such developments acknowledge that, at the very least, victims have legitimate interests in the outcome of the proceedings. Victim' participation is seen today not only as helpful to rehabilitation of victims but also as capable of enhancing the legitimacy of criminal trials. This position reflects the emerging view that criminal justice should not be conceptualised solely as a measure of general human rights protection but also as a remedial measure for victims.

4 REALISING THE RIGHT TO JUSTICE AT THE INTERNATIONAL LEVEL: VICTIM'S PARTICIPATION IN PROCEEDINGS BEFORE INTERNATIONAL AND INTERNATIONALIZED CRIMINAL TRIBUNALS

Despite the growing affirmation of a victim's right to justice in cases of gross violations of human rights and international crimes, it remains true that the concrete realisation of such right remains problematic. In post-conflict situations, for instance, domestic courts often face systemic failures that impede them from effectively investigating and prosecuting international crimes. In other cases, states may be simply unwilling to initiate a criminal action against those allegedly responsible for the crimes. For this reason, the choice has been made in this thesis to consider the law and practice of international and internationalised criminal tribunals, as often these are the only *fora* where victims can obtain justice.

This choice has also been made because the legal position of victims in international criminal law has been significantly transformed in the last few decades. Indeed, the idea of bringing justice to victims was not of central concern to international criminal law at the initial stages of its development, nor were victims granted any independent role in the procedure of international criminal tribunals. Recently established international and internationalised criminal tribunals have, however, introduced procedures aimed at providing redress to victims of crimes within their jurisdiction and have enabled them to participate in their own right in criminal proceedings.

This study has argued that the incorporation of a regime of victim redress within the framework of international criminal tribunals does not only represent an extension of international criminal justice's mandate, but rather confirms a shift in the way in which redress is increasingly conceptualised at the international level. A critical examination of the character of victims' participation and its legal rationale, as well as of the implementation of the victims' participation schemes by international and internationalised criminal tribunals has been thus carried out (Chapter VI). This analysis has demonstrated that the incorporation of victim participatory regimes within recently established international criminal tribunals appears to be consistent with human rights standards that have emerged in relation to victim redress for gross violations of human rights.

Three main elements support this position. First, a close inspection of the legal rationale associated with victims' participation reveals that international and internationalized courts have read the exercise of this right as linked to the effective realisation of other victims' rights, such as the right to justice and the right to truth. Extensive analysis of the legal framework and practice of these courts has revealed that victims have been granted a

number of rights through which they can promote their interest in the prosecution of the offender, including the right to present their views and concerns to the courts, the right to introduce and challenge evidence and the right to question witnesses. Consequently, it was argued that the development of these participatory rights indicates that victims not only have a legitimate interest in the prosecution of perpetrators but a right to it (right to justice), as indicated in principle by the courts examined.

Secondly, the thesis observed how the legal framework of these courts leaves open the possibility of awarding satisfaction, including the prosecution and punishment of perpetrators, as a form of reparation. In this sense, these bodies appear to confirm what has been increasingly demanded by international human rights bodies as an imperative remedy in cases of gross human rights violations, namely victims' right to justice.

Finally, the idea that victims not only have a legitimate interest in the prosecution of perpetrators, but a right to it, is also supported by the fact that courts under examination are increasingly emphasising the need to effectively realise victims' participation in the proceedings. Arguably, the 'effectiveness' requirement (associated in international human rights law with the right to remedy) indicates that certain victims' participatory rights in the proceedings are more than simply 'fair trial rights' for victims which, as such, may be counterbalanced with the fair trial rights of the accused. Rather, as indicated in the practice analysed above, victims' participatory rights are linked to the realisation of the right to truth and justice which, in turn, are integral elements of the right to reparation.

On the whole, international and internationalised criminal tribunals are moving away from their traditional mandate of solely adjudicating international crimes. Today they can also be considered as mechanisms to enforce human rights and in particular the rights of those who have been harmed by the crimes under their review. As such, the practice of international criminal tribunals contributes to the development, including at the international level, of a legal principle that a victim's remedy encompasses the identification, prosecution and punishment of the wrongdoers as well as the access of victims to the procedure establishing criminal responsibility for the violations.

5 PRACTICAL IMPLICATIONS AND POSSIBLE WAYS OF REALISING VICTIMS' RIGHT TO JUSTICE

The analysis carried out in this study has demonstrated that a right to justice has emerged for victims of gross violations of human rights and international crimes. It has been submitted

that this right, which entails the identification and prosecution of alleged human rights offenders, constitutes an imperative element of redress when these violations are at stake. Nonetheless, the analysis has shown that it is not possible to determine that a set of procedural rights in criminal proceedings is attached to victims' right to justice.

It has been argued, however, that in the longer term it is conceivable that some form of participation in criminal proceedings may develop into an international legal standard. This would be extremely important for the effective exercise of victims' right to justice. In principle, once a measure is considered to be a remedy, it is essential to acknowledge a corresponding right of the victim to claim such measure. Therefore, victims' participatory rights in criminal proceedings may be seen as a logical extension of the affirmation of prosecution as an integral element of their right to an effective remedy. The following subsections will discuss some possible ways to develop victim's participatory rights in criminal proceedings and thus, ultimately, to ensure the exercise of their right to justice.

5.1 The Practice of Human Rights Supervisory Bodies

In light of the analysis carried out in this study, it has been argued that the practice of human rights bodies in relation to victims' rights in criminal proceedings raises certain doubts as to its consistency with the development of a victims' right to justice. Indeed, whereas these bodies have increasingly recognised that in cases of gross human rights violations victims have a right to the prosecution of those allegedly responsible for such violations as an element of their right to an effective remedy, they have refrained from elaborating corresponding victims' participatory rights in criminal proceedings.

As we have seen, the thesis has argued that the current practice of human rights supervisory bodies may raise an issue under the provisions on the right to an effective remedy. Indeed, in order to ensure that victims can actually exercise their right to remedy, it is necessary that victims be enabled to claim it. If the right to an effective remedy is understood, in certain circumstances, as including a right to the prosecution of the alleged wrongdoers, it has been advanced that the effective exercise of such right entails, at a minimum, that victims are able to have their say if decisions not to initiate or to terminate criminal prosecutions are taken. Indeed, it goes without saying that if such decisions are taken, victims potentially lose their chances of achieving justice.

Plainly, victims do not (at least, not in every case) have an absolute right to pursue a criminal action. Rather, this decision may lie with a public authority and be subject to certain

conditions, including that of protecting public interests. What matters for ensuring the effective exercise of the right to justice, however, is that victims are able to promote their legitimate interests when decisions on the prosecutions of alleged wrongdoers are taken. This can be done by providing victims with a right to judicial review of decisions not to initiate or to terminate criminal prosecutions. As a matter of fact, an absolute power of the public prosecutor to decide whether criminal proceedings should be instituted or not would be in contradiction with the gradual development of a victims' right to justice. For this reason, it seems legitimate to grant victims some control of prosecutorial decision-making by way of access to review mechanisms with a view to checking the appropriateness of a prosecutor's decision not to go forward. Through the exercise of such a right victims can ensure that prosecutions are not terminated without their interests being taken into account.

As this thesis has shown, the right to judicial review of the decision not to investigate or prosecute has been included in a number of legal instruments adopted both at the national and international levels, some of them of binding nature. Furthermore, under the influence of these documents, the number of states that do not grant opportunities for review of a decision not to prosecute has considerably declined in recent years. As such, in asking states to grant victims a right to judicial it can be said that nothing more will be asked of states than is not already provided for in the relevant domestic criminal system – a concern which has often prevented human rights supervisory bodies from elaborating on victims' involvement in criminal proceedings. And if this is the case, that is if the domestic legal framework does not provide for a right to the judicial review of decisions not to prosecute, human rights supervisory bodies may recommend states to amend their relevant domestic legislation by including such a right, at least in cases of serious crimes, in order to comply with the obligation to provide victims of gross violations of human rights with the right to an effective remedy.

Similar reasoning can be applied with respect to victims' participation in criminal proceedings. It has been argued that the development of a right to justice necessarily demands a reconsideration of the rights that victims are entitled to in the context of criminal proceedings. Indeed, if victims have a right to the determination of the criminal liability of human rights offenders, it is legitimate to assert that they, at the very least, should be informed of the proceedings leading to such determination and be enabled to contribute to them by having their voice heard, not merely as a witness but on their own right.

Nonetheless, as observed above, human rights supervisory bodies have eschewed elaborating specific victim's participatory rights in criminal proceedings, particularly when

these rights are not provided for in the domestic legal framework. This is so despite the fact that they seem to agree that victims should be involved in the proceedings to the extent of protecting their legitimate interest to seeing justice done. Victims' participation is also enshrined as a value in a number of international documents and the progressive introduction of victims' representation in domestic criminal systems (particularly in case of serious crimes) indicates that there is undoubtedly increasing acceptance of the need to take into account victims' interests in criminal trials. Therefore, human rights supervisory bodies may at the least recommend states to adopt procedures, where they are not already in place, to allow victims to express their views and concerns on their own right, thereby contributing to the final outcome of the trial and to the realisation of their right to justice.

On the whole, it has been argued that a coherent interpretation of the provisions on the right to an effective remedy, particularly in light of the emergence of a right to justice as an integral component of the remedy owed to victims of gross human rights violations, would allow human rights supervisory bodies to elaborate corresponding victims' participatory rights in criminal proceedings. In particular, regardless of the existing differences between the various domestic criminal systems, human rights supervisory bodies may demand states to grant victims of gross violations of human rights: (i) the right to the judicial review of decisions not to investigate or prosecute; and (ii) the right to express their views and concerns in criminal proceedings related to those allegedly responsible for the crimes in question.

In so doing, human rights bodies may contribute significantly to the effective exercise of victims' right to justice at the domestic level. Indeed, as observed above, pronouncements by human rights bodies may promote the adoption of legislative amendments introducing certain forms of involvement of victims in criminal proceedings, particularly in those systems where such rights have not been traditionally recognised. Furthermore, if case law on victims' rights in criminal proceedings will be developed, this may contribute, together with the existing international legal instruments, to the affirmation of relevant international legal standards which may, in turn, influence domestic law and practice. It remains to be seen whether, and if so how, in the coming years these emerging international legal standards will be translated into participatory rights.

5.2 Domestic Criminal Procedures

This thesis has shown how in recent years measures have been adopted in several domestic jurisdictions aimed at enhancing the protection of victims' interests in criminal proceedings.

Such measures have recognised a victim's right to judicial review of decisions not to investigate or prosecute and their right to participation and representation in the trial process, particularly in cases of serious crimes. On the whole, the thesis has observed the growing recognition of victims' rights in criminal proceedings as desirable even in those systems where victims have not traditionally been granted any rights in criminal proceedings.

It has been argued that the gradual development of victims' rights in criminal proceedings in domestic systems can be defined as a 'top-down' process in the sense that international norms and standards, as well as the practice of human rights treaty bodies, have influenced the adoption of corresponding norms at the domestic level. Both binding international law (in the form of international treaties or binding decisions of human rights supervisory bodies) as well as more diffuse mechanisms such as that of reputation in international relations (in the case of soft law instruments or non-binding pronouncements of human rights bodies) have combined to influence the adoption of norms at the national level.

Nonetheless, it remains true that significant differences continue to exist in relation to the degree and modalities of involvement of victims in criminal proceedings between the various domestic systems. Furthermore, there remains strong resistance from states, particularly those applying adversarial procedures, with regards to giving victims formal rights. In such cases the introduction of a third party to proceedings is still seen as potentially endangering the effectiveness and fairness of proceedings. Therefore, it would be completely unrealistic to expect that in the coming years the development of a right to justice for victims of gross human rights violations would lead to the adoption of uniform procedures at the domestic level in respect to victims' rights in criminal proceedings.

Rather, what can reasonably be expected is that the outright exclusion of victims from criminal proceedings is unlikely to be sustainable in the longer term, in light of the emerging international legal standards on the matter. Indeed, recent developments, both at the international and at the domestic level, indicate that it is possible and indeed necessary to ensure effective enforcement of the right to justice through some form of involvement of victims in criminal proceedings. However, the extent to which victims will be allowed to participate in criminal proceedings and the forms of such participation will take remains to be seen and could be the object of further study in the next decade.

Careful consideration must be given as to whether domestic legal systems will be able to ensure the effective realisation of victims' right to justice, regardless of the procedural model adopted. As the thesis has observed, various obstacles may hinder the ability of domestic courts to realise such a right. Indeed, certain legal bars to prosecution remain in

place and the victims' demands for justice may be set aside when traditional prerogative of states are at stake. Such persistent traditional prerogatives include the personal immunities of senior state officials or mechanisms shielding perpetrators from accountability such as amnesties that are sometimes necessary to bring an armed conflict to an end. Additionally, practical obstacles may obstruct the realisation of victims' right to justice, especially in cases of gross human rights violations. In particular, in some cases domestic institutions may simply be unable to deal with complex cases such as those characterised by this type of violation, or with the potentially high number of victims of these violations. The question thus arises as to whether such a right may be better enforced at the international level, namely in the context of international and internationalized criminal tribunals.

5.3 International and Internationalized Criminal Tribunals: A Step Towards the Realisation of Victims' Right to Justice

The analysis carried out in this thesis has shown that international and internationalized criminal tribunals may contribute substantially to the effective realisation of the right to justice for victims of gross human rights violations amounting to international crimes. This is so for three main reasons. First, bars to prosecution do not apply in the context of international and internationalized courts and tribunals. These bodies have repeatedly indicated that prosecution of international crimes cannot be barred by any legal obstacle. Unlike domestic criminal tribunals, for instance, personal immunities are not considered to apply before international and internationalized criminal tribunals. As such, these bodies may bring perpetrators to justice even when domestic courts have failed to do so, thereby contributing to the effective realisation of victims' right to justice.

Second, in situations of political instability or systemic failure, which often follow or accompany international crimes or gross violations of human rights, international criminal tribunals may be the only *fora* capable of bringing perpetrators to justice, and in doing so ensuring the realisation of the corresponding victims' right.

Third, it has been shown that recently established international and internationalised criminal tribunals have introduced procedures aimed at enabling victims to participate in the proceedings in order to exercise their right to justice. At the same time, these bodies have elaborated considerable practice on how to implement such a right in a context of mass victimisation, usually involving high number of victims, whilst ensuring the fairness and effectiveness of the proceedings (and notably in the context of adversarial proceedings as is

the case with the ICC). In so doing, these bodies have not only reinforced the idea that victims have both a legitimate interest in prosecution and a real right to it, but that they also have corresponding participatory rights which derive from their right to justice.

Plainly, this does not mean that international and internationalized criminal tribunals are the only *fora* where victims can enforce their right to justice. Rather, as argued in the thesis, it is primarily for domestic courts to enforce such right, by prosecuting those allegedly responsible for gross human rights violations and international crimes. Moreover, not all gross human rights violations amount to international crimes and, as such, do not fall within the jurisdiction of international criminal tribunals. Furthermore, since international criminal tribunals only deal with a small portion of perpetrators of international crimes it is crucial that domestic criminal tribunals are equally able to provide justice to victims.

However, the law and practice of international and internationalized criminal tribunals may also offer an important contribution in that regard. On the one hand, the practice of these bodies, as well as their legal framework, may come to influence decisions taken at the domestic level. Consequently, in the long run one can expect that international courts and tribunals will offer a valid contribution to the development of a norm which prohibits any obstacles to prosecution of international crimes and, eventually, to the effective exercise of the right to justice for victims of such crimes. On the other hand, the practice of international criminal tribunals contributes to the development of a legal principle that a victim's remedy encompasses the identification, prosecution and punishment of the wrongdoers as well as the access of victims to the procedure establishing criminal responsibility for the violations. This legal principle may, in turn, influence domestic law and practice.

On the whole, the practice of international criminal tribunals has not only contributed to the emergence of a legal principle. It also potentially offers an indication of how to foster the realisation of victims' right to justice at the domestic level. In affirming that criminal procedures must accommodate the interests and the rights of the victim the message has been sent to other *fora*, including domestic criminal courts, to adopt new procedures that depart from outdated theories on the nature of criminal offences and the objectives of criminal trials.

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